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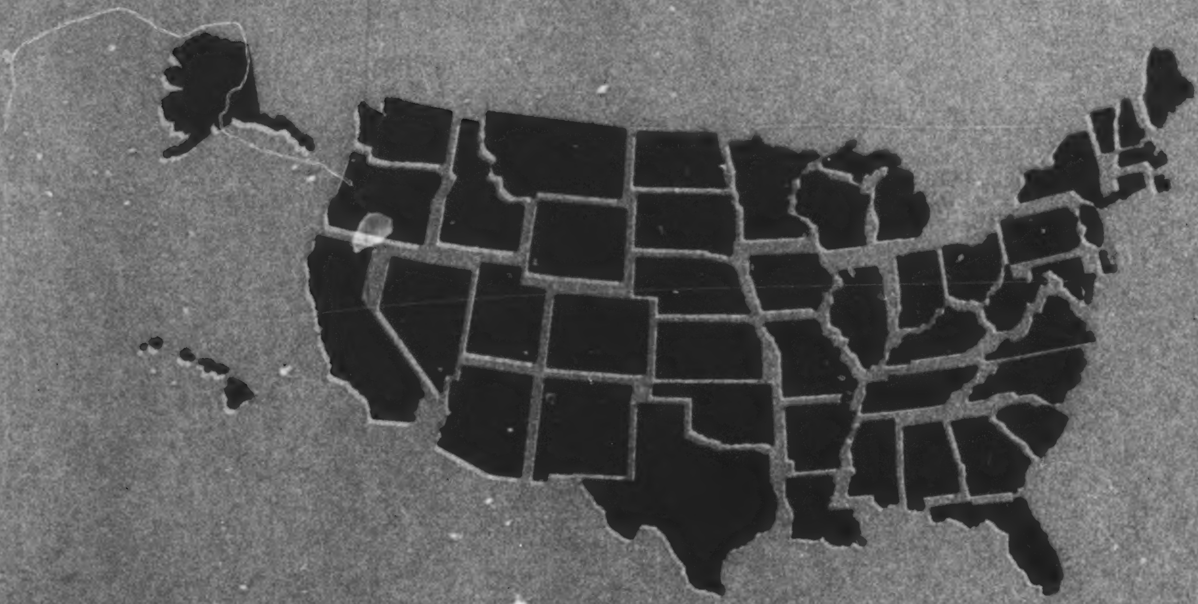
STATE CONSTITUTIONS IN THE FEDERAL SYSTEM

Selected Issues and Opportunities for State Initiatives



ADVISORY COMMISSION ON
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A-113
July 1989

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Advisory Commission on
Intergovernmental Relations

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State Constitutions in the Federal System

Selected Issues and Opportunities for State Initiatives

Preface

The following study of state constitutional law examines a vital aspect of the reinvigoration of the states in our federal union. The study also complements ACIR's pathbreaking report *State Constitutional Law: Cases and Materials* (1988). In addition, this study sheds light on several issues that have been examined in various ways by the U.S. Advisory Commission on Intergovernmental Relations during the past three decades, especially balance in the federal system, the constitutional integrity of federalism, the strengthening of state capabilities, and the sorting out of responsibilities in the federal system.

The American federal system rests on two constitutional pillars: the 50 state constitutions and the United States Constitution. Metaphorically speaking, if one or the other pillar is cut down in size or raised too high, then the federal system becomes unbalanced. In many respects, this is what has happened to our federal system. The law of the U.S. Constitution, particularly as developed by the U.S. Supreme Court during the past 50 years, has come to overshadow state constitutional law to such an extent that state constitutions are, for many citizens, out of sight and out of mind. For example, ACIR's 1988 national poll (see *Changing Public Attitudes on Governments and Taxes, 1988*) found that fewer than half of the respondents even knew that their state has its own constitution. Yet state constitutions are important democratic governing documents, and they can be all the more important if their role in the federal system is understood properly. As such, a renewed appreciation of state constitutional law is essential for restoring a better balance of national-state authority in the federal system.

A strengthening of the state constitutional pillar is also essential for protecting the constitutional integrity of the federal system. This integrity depends not only on fidelity to the principles of federalism embodied in the U.S. Constitution but also on the independent vitality of the state constitutions. This state constitutional pillar was built first by Americans when they sought to establish home-rule republican governments during the Revolutionary War and the period of Confederation. The U.S. Constitution, therefore, is one of limited, delegated powers. The state constitutions encompass, in principle if not now in practice, the many fundamental powers of governance that have been reserved to the states and to the people by the Tenth Amendment to the U.S. Constitution. The erosion of these inherent state powers by an imperial vision of federal constitutional law threatens the very foundation of the federal system. The U.S. Constitution does not replace state constitutions; instead, it supplements those constitutions by providing for constitutional governance nationwide on matters of general public interest and, in so doing, protects the states as co-sovereign constitutional polities and guarantees each state a republican form of government.

A renewal of the vitality of state constitutional law is also the foundation for strengthening state capabilities. This is so for three reasons. First, in a constitutional democracy, any enhancement of state capabilities must take place within the context of constitutional rule. In the states, this means that the people must decide on the scope and powers of the state government. Second, most state constitutions contain a great deal of detail, much of which limits state government. Although contemporary reformers often criticize this detail as being too constraining for elected officials, it should be remembered that much of the detail represents efforts by past reformers to assert greater public control over government. The real question is not detail per se, but what kind of constitutional detail represents general public interests rather than special interests, and what kind of detail is harmful rather than beneficial to state action. Third, state capabilities vis-a-vis the federal government cannot be enhanced significantly unless there is strength in, and respect for, the states as constitutional polities in their own right (see also ACIR's *The Question of State Government Capability*, 1985).

The development of state constitutional law is also relevant to the sorting out of responsibilities in the federal system. One sees this sorting out occurring in the "new judicial federalism" whereby the U.S. Supreme Court has shown greater solicitude for independent state court protections of individual rights and liberties. If states had no important or independent governing responsibilities, there would be no need for state constitutions. The very existence of dual constitutionalism signifies both a division and sharing of responsibilities between state and nation. Furthermore, many new issues emerging on the public scene are not easily encompassed by the U.S. Constitution, but are, or can be, encompassed by state constitutions.

We should add, however, that not everyone will be happy with all of the state constitutional law developments reported in this study. Those who believe, for example, that federal courts have expanded certain rights, such as criminal rights, too far will be dismayed by activist state supreme courts that have expanded rights even further. Others will be dismayed that many state courts are not yet active enough in developing state constitutional law. If one values federalism, however, and the dual constitutionalism that underlies it, then one cannot let opinions about particular developments overshadow the more fundamental issues of the place that state constitutional law should occupy in a strong and balanced federal system. The prominence of that place is one question; whether that place should be liberal or conservative, activist or restraintist is another question.

It is the second question that has to be answered by the actual constitutional choices made by the citizens of each of the 50 states. Fortunately for the vitality of American democracy, state constitutions provide the general public with many direct and indirect vehicles for shaping the development of state constitutional law. Hence, state constitutions, unlike the U.S. Constitution, call on citizens to participate very directly in framing the fundamental law of their respective polities.

Robert B. Hawkins, Jr.
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Acknowledgments

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Each member of the study team read and commented extensively on all of the draft chapters, so that this final report is truly a joint effort.

Thanks are expressed to each of these authors, and also to the following individuals who participated in reviewing the study as it progressed through various stages: Phyllis Bamburger, Norman Beckman, Joyce Benjamin, John Callahan, Ronald K. L. Collins, William Colman, Vicki Jackson, Carolyn Jourdan, John Kamensky, Mary Kazmerak, Susan Lauffer, Michael Libonati, James Martin, Hon. Milton Mollen, Thomas R. Morris, John Pittinger, Stewart G. Pollock, Douglas Ross, Lee Ruck, Martin A. Schwartz, John Shannon, and Harry Swegle.

At ACIR, secretarial assistance was supplied by Lori A. Coffel.

ACIR is grateful for the help of all those who contributed advice, research materials, and critical review for this study. Full responsibility for the content of the report, however, lies with the Commission and its staff.

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Findings

1. State Constitutions "Complete" and "Balance" the Nation's Constitutional Framework: State Constitutions Are Essential

The state constitutions and the U.S. Constitution are coordinate documents which, together, provide the total framework for government within the United States. Neither can stand alone. However, with the rise to prominence of federal constitutional law and the expansion of federal power, public and judicial understanding of state constitutional law has been weakened, so much so that when most people think of constitutional law, they think only of federal constitutional law.

Yet, all of the states in the original confederal Union had constitutions or charters of their own before the U.S. Constitution was drafted and ratified in 1787-1788. Those state constitutions did then, and still do, provide the framework for many aspects of government not covered by the U.S. Constitution. In addition, they provide alternative approaches to aspects of government also addressed in the U.S. Constitution. In some cases, state constitutions supplement and go beyond provisions in the U.S. Constitution.

Some of the matters addressed in the state constitutions, but not in the U.S. Constitution, are the structure, functions, and finances of state and local governments; the constitutional standing of local governments in disputes with the state; state-local relationships in the broadest sense; limits on the ability of the state to mandate functions and expenses on local governments; and the regulation of property, including the land development process. These are matters of immense significance for intergovernmental relations and for the American federal system. It is impossible to appreciate the dynamics of this federal system, and to realize its potential for producing diversity within unity, without a sound and fully developed understanding of state constitutional law.

2. The States Are Independent Polities with Their Own Philosophies of Government

Until the present U.S. Constitution was created, the states were sovereign governments in their own right. In ratifying the U.S. Constitution, they delegated certain of their powers to the federal government and transferred a certain degree of sovereignty. However, they reserved all residual powers to themselves and to the people.

The state constitutions are based on diverse understandings and philosophies of government, are substantially easier to amend than the U.S. Constitution, provide for direct citizen involvement in the process of amendment and change (unlike the federal Constitution), have a tendency, therefore, to accumulate detailed provisions that some people believe should be left to statutory law, and have bills of rights that often are different from the U.S. Bill of Rights. It is important to understand these differences between state constitutional law and federal constitutional law if the full potentials of the states, and of their local governments, are to be realized within the American federal system.

3. The United States Constitution Allows Substantial Room for the Development of a Separate Discipline of State Constitutional Law

The study of state constitutional law reveals a number of federal constitutional doctrines that potentially limit federal intrusions into state and local affairs, and that limit the jurisdiction of the U.S. Supreme Court and federal district courts over matters reserved to the states. For example:

- A state constitutional grant of authority to state and local governments is unlikely to be preempted by federal courts when it (1) regulates a subject matter traditionally left to the states, (2) uses historic police power objectives concerning health, safety or morals, (3) involves objectives that are compatible with or supplemental to the purposes of any federal regulation in the subject area, (4) concerns a subject area that has not been explicitly preempted by federal law, and (5) affects dimensions of an activity not comprehensively regulated by federal law.

- The "dormant commerce clause" doctrine furthers the federal interest in national free trade, but exhibits a pronounced deference to state government rulemaking in the commercial realm when it (1) is designed to promote traditional police power objectives, such as health or safety, rather than the business interests of the state's own residents, (2) treats out-of-state and in-state economic entities in an even-handed manner, and (3) does not vary from national standards to such an extent that it imposes conflicting obligations or cumulative burdens on multistate businesses.
- The doctrine of "adequate and independent state grounds" prevents the U.S. Supreme Court from reviewing a state high court judgment that plainly rests on a determination of state law.
- The "abstention" and "equitable restraint" doctrines restrict the original jurisdiction of the federal district courts in favor of state court declarations of state constitutional and statutory law.

Thus, the federal judiciary has created certain opportunities, within its understanding of the U.S. Constitution, for state foresight and assumption of responsibility. The current movement to integrate state constitutions into the process of state lawmaking opens the possibility that the promises of diversity within unity in American federalism can be realized.

4. State Constitutions Are the Business of Governors, Legislatures, the People, and the Courts

Most state constitutions are amended much more easily and frequently than the U.S. Constitution. Citizens promote or affirm these changes by initiative or referendum. In addition, governors and legislatures frequently are involved in providing leadership for constitutional change. Interpretations by state judges, who often are elected, are also a major force for change. However, because of the direct role of citizen participation in state constitutional development, amendment plays a larger role in the change process than it does for the U.S. Constitution. Judicial interpretation, which is the dominant means of giving new meanings to the U.S. Constitution, plays a smaller, though still important, role in keeping state constitutions up to date. Thus, the politically responsive nature of state constitutions is more directly apparent than that of the U.S. Constitution.

The prolific amendment capacity of state constitutions has yielded many reforms in recent years, as well as certain causes for concern. Examples of reforms include home rule, strengthened executive management and budgeting, and more capable legislatures. However, concerns arise when the state judiciaries, often subject to the electoral process, become embroiled in political campaigns, when legislators or governors promote excessive constitutional restrictions on local governments, when citizens fail to vote for constitutional amendments that seem to be too obscure or complex to understand, or when emotional issues of the moment produce constitutional changes that lack foresight or sensitivity to certain groups of citizens.

5. State Constitutional Law Is an Underdeveloped Field with Great Potential

A 1988 Commission poll revealed that only 44 percent of Americans know that their state has its own constitution. Even among lawyers, state constitutional law is relatively unknown and little practiced. Compared to the U.S. Constitution, state constitutions are less frequently mentioned in the history and civics classes of public schools or the university, and regular reporting of state constitutional decisions, as well as the statistics of state court activities, has been, until very recently, quite rare. Even the law schools seldom offer courses in state constitutional law. If the American federal system is to be properly balanced—giving full rein to the potentials of local governments, the states, and the national government—then the field of state constitutional law needs to be developed more fully.

Recommendations

Recommendation 1

Promoting Public Understanding of and Support for State Constitutional Law

The Commission finds that widespread public understanding of and support for the vital role that state constitutions and state constitutional law play in maintaining a proper balance in the American federal system is essential for the full development of the nation's potential. The importance of voter initiatives and referendums in the process of revising state constitutions is a major reason for this finding. Yet, most citizens are unaware even of the existence of the 50 state constitutions.

The Commission recommends, therefore, that:

- The Commission on the Bicentennial of the U.S. Constitution recognize the importance of state constitutions and constitutional law in "completing" the U.S. Constitution.
- State bicentennial commissions and humanities councils include consideration of state constitutions in their public programming.
- State associations of judges and legislators include consideration of state constitutions and constitutional developments in their continuing education programs.
- State and local education agencies require schools to teach units in state history and/or government in which the state constitution and its development are discussed. (State judges, legislators, and executive officials should involve themselves in this activity.)
- Colleges and universities give attention to state constitutions and state constitutional law on a par with that given to the U.S. Constitution in history and government courses.
- The mass media provide regular coverage of state constitutional developments.

Recommendation 2

Developing the Capability to Improve State Constitutional Law

The Commission finds that adequate capability to fully develop the field of state constitutional law does not yet exist within the legal profession or within the political leadership of the states.

The Commission recommends, therefore, that law schools teach state constitutional law as part of their regular curriculum, that state bar examiners include a section on state constitutional law in their bar exams, and that public and private institutions support research on state constitutional law. Among the issues that should be addressed are: the interaction of state judicial, legislative, and executive agencies in the development of an independent state constitutional law; the implications for state constitutional law of elected judiciaries and constitutional documents that are fairly easy to change; how developments in state constitutional law spread from one state to another; and what legal and other barriers exist to inhibit the development of an independent state constitutional law.

The Commission recommends, in addition, the establishment of a clearinghouse for information on state constitutional developments. Such a function could be undertaken by an existing organization (such as the National Association of Attorneys General or the National Center for State Courts) or by a new organization created for the purpose.

Recommendation 3

Recognizing Shared Responsibility for State Constitutional Action

The Commission finds that the growing responsibilities being placed on the states and their local governments require adequate and responsive provisions in state constitutional law. These matters must be addressed independently within each state, taking into account the unique traditions and philosophies of government that exist in each state as well as the direct role played by citizens in the development of state constitutional law in contrast to federal constitutional law.

The Commission recommends, therefore, that citizens, legislatures, and governors recognize their own responsibilities for advancing and reforming state constitutional law rather than relinquishing that role entirely to the courts or consigning the most difficult issues to the U.S. Supreme Court.

The Commission also recommends that each state give renewed attention to the adequacy and responsiveness of its constitution for today's world, and that the development of state constitutional law be understood as a joint responsibility of the legislature, governor, courts, and citizens. The Commission encourages state high courts to develop independent bodies of state constitutional law, but also to recognize that U.S. Supreme Court models of jurisprudence are not always appropriate to the shared roles of citizens, legislatures, and governors in state constitutional change and enforcement.

The Commission further recommends that the high court or courts in each state establish principles for attorneys practicing before the courts of the state that would require them to look first to the state constitution as the basis for litigation rather than to the U.S. Constitution.

The Commission recommends, furthermore, that states take steps to identify and resolve intergovernmental issues and problems that may arise from existing state constitutional law. Given the decline in federal aid to local governments and the shifting of responsibilities taking place in the federal system, issues likely to need attention now include the provision of adequate local government authority and capacity to meet growing responsibilities, stronger state-local relationships to compensate for weakened federal-local relationships, and revised allocations of functions and financial responsibilities between the states and local governments and among local governments. State constitutions and statutes should provide for flexibility of form, function, and finance for local governments.

Recommendation 4
Recognizing the Importance of State Constitutional Law in Rebalancing the Federal System

The Commission finds that the recently renewed interest in state constitutional law by judges, attorneys, scholars, and state and local policymakers is an important development in American federalism. Rebalancing of responsibilities in the federal system is necessary in order to give state and local governments greater authority and discretion to serve the needs of their citizens. One necessary feature of such rebalancing is recognition of and respect for the coequal importance of state constitutional law in the American system of constitutional government. The vitality of federalism rests on two constitutional pillars: (1) independent state constitutional law and (2) protections of federalism in U.S. constitutional law.

The Commission, therefore, commends the U.S. Supreme Court for honoring the "adequate and independent state grounds" doctrine, and recommends that the Court continue to honor this doctrine and to allow the states to experiment with solutions to the difficult issues that confront our society and to develop their own principles of state constitutional law appropriate to the goals and conditions of the people, institutions, and political subdivisions of the different states.

The Commission also recommends that both the Congress and the Supreme Court refrain from imposing restrictions on the independence of the states and their political subdivisions unless there is clear federal constitutional authority to do so and (1) a clear threat to national unity, (2) a clear need for uniform national policy, or (3) a clear conflict with express provisions of the Constitution of the United States. It is as important, for example, to provide antitrust immunity to the political subdivisions of the states as to the states themselves.

More specifically, the Commission recommends that the following federal constitutional doctrines be applied consistently by the courts to limit federal intrusions into state and local affairs concerning matters reserved to the states:

- A state constitutional grant of authority to state and local governments should not be preempted by federal courts when it (1) regulates a subject matter traditionally left to the states, (2) uses historic police power objectives concerning health, safety, or morals, (3) involves objectives that are compatible with or supplemental to the purposes of any federal regulation in the subject area, (4) concerns a subject area that has not been explicitly preempted by federal law, and (5) affects dimensions of an activity not comprehensively regulated by federal law.

- The "dormant commerce clause" doctrine, although it furthers the federal interest in national free trade, should also be used to bolster deference to state government rulemaking in the commercial realm when it (1) is designed to promote traditional police power objectives, such as health or safety, rather than the business interests of the state's own residents, (2) treats out-of-state and in-state economic entities in an evenhanded manner, and (3) does not vary from national standards to such an extent that it imposes conflicting obligations or cumulative burdens on multistate businesses.

- The doctrine of "adequate and independent state grounds" should be invoked to prevent the U.S. Supreme court from reviewing a state high court judgment that plainly rests on a determination of state law.
- The "abstention" and "equitable restraint" doctrines should be invoked to restrict the original jurisdiction of the federal district courts in favor of state court declarations of state constitutional and statutory law.

The Commission recommends, further, that, whenever possible and appropriate, state judges look to state constitutional provisions first, using the "adequate and independent grounds" doctrine, when deciding constitutional questions, rather than turning immediately to the U.S. Constitution. By interpreting state constitutional provisions independently of how similar provisions of the U.S. Constitution are interpreted, state courts can protect their decisions from U.S. Supreme Court review and thereby foster the growth of an independent body of state constitutional law.

The Commission also recommends, as a supplementary measure of protection, that states increase their support for the State and Local Legal Center so as to maintain a strong presence on the many federalism issues that come before the U.S. Supreme Court.

The Commission once again urges the Congress to recognize and affirm the importance of state constitutional law in the American federal system and exercise restraint in preempting state and local responsibilities as well as in mandating responsibilities and expenses on state and local governments. To help bolster the Congress' resolve in these matters, the Commission recommends that the states establish a "federalism impact process" by which they could respond, in a timely fashion, to contemplated actions by the Congress that might diminish state and local authority. The Academy for State and Local Government should be considered for this role.

Chapter 1

Introduction

This study examines selected aspects of the place of state constitutional law in the American system and of recent developments in state constitutional law, particularly as this body of law has been developed by state high courts. The study is not intended to be comprehensive because a full examination of the many facets of state constitutional law would require several large volumes. Instead, we have sought to focus on certain aspects of state constitutional law that highlight the importance, variety, and innovativeness of developments in the states. This study looks, therefore, at the bearings of state constitutions on state government structure, civil liberties, equality, criminal rights (the exclusionary rule), economic and property rights, workers' compensation, and education.[1]

This study takes on particular importance when one considers the results of ACIR's 1988 national public opinion poll. Only 44 percent of American adults knew that their state has its own constitution, and 44 percent of the respondents did not know that their state constitution has its own bill of rights.[2] Perhaps these results are not surprising because, after all, so much attention has been given to federal constitutional law in recent decades that "constitutional law" today is virtually synonymous with federal constitutional law.

This eclipsing of state constitutional law in the minds of not only the general public but also many policymakers is one indicator of the condition of contemporary American federalism. Renewed attention to and interest in state constitutional law, therefore, must be viewed as part and parcel of any effort to restore a better balance of national-state power in the federal system. The American system of dual constitutionalism represents a unique and highly successful experiment in democratic governance, one that needs constant attention if we are to continue to make it work, and work better.

The Constitution of the United States: The Oldest Written Constitution in the World?

Another indicator of the eclipsing of state constitutions is that during 1987, the year of the bicentennial of the drafting of the Constitution of the United States of America, that revered document was often said to be the oldest, still operative, written constitution in the world. Even forgiving some exaggeration, the careful observer should recognize that the claim is not true. The oldest, still operative, written constitution in the world is the Constitution of Massachusetts, written largely by John Adams and ratified by the citizens of Massachusetts in 1780, a full seven years before the Constitution of the United States was written in Philadelphia.[3] The Constitution of the United States, of course, continues to be the oldest, still operative, written, *national* constitution in the world.

Beyond the need for historical accuracy, the longevity of the Massachusetts Constitution is important because it underscores the limited role that the United States Constitution was designed to serve in the American federal system. The thirteen original states were fully functioning constitutional entities before 1787. Delaware, Maryland, New Hampshire, New Jersey, North Carolina, Pennsylvania, South Carolina, and Virginia all enacted constitutions in 1776. Georgia and New York wrote constitutions the following year, 1777. Massachusetts adopted its constitution in 1780. Only Connecticut and Rhode Island continued to function under their colonial charters until they replaced them with constitutions in 1818 and 1842 respectively.[4] Thus, Americans had considerable experience with written constitutions before the framers met in Philadelphia during the summer of 1787. Indeed, much of the debate that took place, both in the Constitutional Convention itself and in the state ratifying conventions, demonstrates how the framers of the U.S. Constitution built on these state constitutional experiences.[5] In *The Federalist*, for example, one finds repeated references to state constitutions, both positive and negative.

The Constitution of the United States as an "Incomplete Document"

The Constitution of the United States is dependent on state constitutions in an even more profound and contemporary way. As Donald S. Lutz has suggested, the Constitution of the United States is "incomplete."[6] It is predicated on the continued existence and vitality of state constitutions. Unlike many constitutions in Europe and elsewhere in the world, the Constitution of the United States is silent, or mostly silent, on such fundamental constitutional matters as local government finance, education, and the structure of state and local government. These and other constitutional matters are left to the states to resolve, in keeping with their own needs, preferences, and traditions. Thus, the "complete" American *constitution* includes both the Constitution of the United States and the constitutions of the 50 states—both as they are written and as they are implemented and interpreted by judges and other government officials.

The Constitution of the United States delegates limited, although important, powers to the national government. When exercising those delegated powers, the laws of the United States are supreme. State laws, and even state constitutional provisions, must yield to these legitimate expressions of national authority. At the same time, because national authority is limited to those powers delegated by the U.S. Constitution, the states retain broad areas of policymaking authority to themselves. The areas of public policy reserved to the states are controlled not by the U.S. Constitution, but by the constitutions of the 50 individual states.

At least since 1937, however, the constitutional delegations of authority to the national government have been interpreted broadly; consequently, there is hardly an area of social or economic life that cannot be reached now by the national government. This is not to suggest that the national government can, constitutionally, control all areas of public policy, only that it can influence them. For example, few Americans would contend that the national government could mandate a uniform curriculum for the nation's schools. At the same time, few would deny that the federal government has had a considerable impact on curriculum through its grant-in-aid system, its curriculum development projects, and its initiatives in such areas as bilingual education, the education of the handicapped, and school desegregation. Despite this federal presence, however, the states (and their subdivisions) play the dominant role in setting education policy.

Today, few areas of public policy belong exclusively either to the national government or to the states. Rather, policy responsibility is shared between the national government and the states. In some areas, such as foreign policy, the federal government is the dominant actor; in others, such as education, the states play the principal role. Given the expansion of national authority, especially since 1937, one can argue about how much policymaking "room" is left to the states. Nevertheless, it is important to recognize that just as we conceive of the federal government as a polity, both energized and constrained by the U.S. Constitution, so also must we think of the states as polities, energized and constrained by their own constitutions.

The States as Polities

From this perspective, the American states are polities within the framework of the American federal system.[7] That is, the primary role of the states is to make policy choices dealing with that wide range of matters assigned to them by their citizens and left open to them by the very incompleteness of the U.S. Constitution. To put the matter somewhat differently, and without disparaging the crucial role of the states in the implementation of national programs, the states are political arenas for the forging of public policy, not administrative agencies for the implementation of policy made by the national government.

As polities, the states require rules both for the management of political conflict and for the determination of what is legitimate public policy. In some federal systems, these basic decisions are made in a single, national constitution. The states of India, for example, do not have their own constitutions; their political authority and organization are provided for in the national constitution.[8] In Brazil, while the states write their own constitutions, they make few important choices because they must conform to the detailed provisions of the national constitution.[9] These arrangements may be appropriate for India and Brazil, where the national government is the principal arena for policymaking, but a different arrangement is necessary where the states play an important policymaking role.

Furthermore, if the American states are policymakers, and have the right to enact constitutions to serve as the frameworks for that policymaking process, then we would expect considerably more variation, both in terms of policy outcomes and policy processes, than we might find in federal systems which are, in effect, merely decentralized administrative systems. Such diversity may be a blessing or a curse, depending on one's perspective. In the American federal system, there is always a tension between uniformity and diversity. Unfortunately, there is no clear formula to instruct us on when to opt for one or the other; rather, the choice more usually is made in the various arenas of the political process—legislatures, executive agencies, and courts.

The United States Constitution as a Constraint on the States

Of course, the U.S. Constitution serves as an overarching framework in which the states (and the federal government) perform their governing functions. This framework—as originally written, as amended, and as interpreted—constrains the states in many important ways.

First and clearly foremost, Article VI of the U.S. Constitution provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land. . . ." This supremacy clause makes it clear that the Constitution, along with legitimate national laws and treaties, are superior to state enactments, including state constitutional provisions.

Sometimes, the words of the U.S. Constitution as they limit the states are fairly clear, as, for example, when the Constitution prohibits the states from "grant[ing] Letters of Marque and Reprisal; coin[ing] Money; [or] emit[ing] Bills of Credit. . . ,"[10] although even these specific limitations are subject to some interpretation. The range of possible interpretations increases with the indefiniteness of the language, as, for example, when the Fourteenth Amendment requires the states to accord their residents "due process of law." Debates about the meaning of the Constitution are resolved primarily by the Supreme Court of the United States, so that, according to one observer, the Supreme Court is "the umpire of the federal system."[11]

This umpiring function is performed in three types of cases: (1) where there is an alleged conflict between a state constitutional provision or enactment and a provision of the Constitution of the United States, (2) where there is some conflict between state and federal laws or treaties and the validity of either or both is called into question, and (3) where the constitutionality of a federal law or treaty affecting national-state relations is challenged. The particular issue involved may concern an economic regulation or a personal liberty. Given that the U.S. Supreme Court applies different standards of review for each type of issue, each must be discussed separately.

The Supreme Court and State Economic Policy

When confronted with a claim that a state economic regulation violates some provision of the U.S. Constitution, the record of the U.S. Supreme Court has been quite mixed. The charge that a state economic regulation violates the U.S. Constitution is usually based on one of several claims: (1) that the challenged state action is in violation of that provision of the Fifth Amendment which prohibits the taking of private property for public use without just compensation;[12] (2) that a state regulation violates either the due process or equal protection clause of the Fourteenth Amendment;[13] (3) that the state law is one "impairing the obligation of contracts" in violation of Section 10 of Article I;[14] (4) that a state law so favors its own citizens that it violates the interstate privileges and immunities clause of Article IV, Section 2;[15] (5) that the state law regulates an aspect of interstate commerce reserved exclusively to the national government;[16] or (6) that a state revenue measure is, in fact, a duty on imports or exports in violation of Article I, Section 10.[17]

These claims are treated more fully in chapter 2 of this study; here it merely should be pointed out that the six claims fall into two different categories: (1) that the state has violated a right of its own residents that is protected by the U.S. Constitution (e.g., the just compensation, impairment of contracts, due process, or equal protection provisions), and (2) that the state action has an unconstitutional "spillover effect" on other states (e.g., the interstate commerce, privileges and immunities, or duty on imports or exports provisions).

With regard to the first sort of claim—that the state has violated the property rights of its own citizens—the U.S. Supreme Court since the 1930s has come to the position of allowing the states considerable discretion, only rarely striking down state actions.[18] Although there has been some revival of the "takings" provision of the Fifth Amendment,[19] the Supreme Court has shown little recent inclination to support claims of this first type.

However, the Supreme Court continues to play a more active role when confronted with claims that a state action adversely affects the rights or interests of other states or citizens of other states. For example, the Court will look closely at state actions that allegedly place an "undue burden" on interstate commerce[20] or appear to "discriminate" against other states or citizens of other states.[21]

These two patterns of decisions by the Supreme Court have important implications for state constitutions. First, to the extent that the U.S. Supreme Court no longer protects property rights against state actions, individuals must look to their state constitution and state judiciary for the protection of their property rights. Second, the states would appear to have considerable constitutional discretion in structuring economic relationships among their own citizens, so long as the state action has relatively little impact beyond its borders.

The situation is considerably more complicated where there is an alleged conflict between state and federal laws affecting the same subject matter. Where the conflict is clear and irreconcilable, then, of course, the supremacy clause mandates that the state law must yield.[22] When the conflict is not so clear, then the Supreme Court has taken on the role of deciding whether the federal law preempts the field and therefore precludes state regulation of the same subject matter. The standards for deciding whether a field has been preempted by the federal government have not been articulated very clearly,[23] and at least one member of the Court—Chief Justice William Rehnquist—has argued that the Court should invoke the doctrine only when Congress has made a clear decision to preempt.[24]

Finally, decisions of the Supreme Court either upholding or striking down national legislation also have a profound effect on federalism. Prior to 1937, the Supreme Court frequently struck down national economic legislation, often on the grounds that the federal law invaded a field reserved to the states exclusively by the Tenth Amendment.[25] Since the "constitutional revolution" of 1937, however, the Court, with one exception,[26] has abandoned the Tenth Amendment entirely. This abandonment has been so complete that one might conclude that there are virtually no constitutional restraints on national authority except for those found in the Bill of Rights. Even recognizing the exaggeration, it still does suggest that to the extent that there are any restraints on federal authority, they are more likely to be found through the political process than through the courts.[27]

The Supreme Court and State Civil Liberties Policy

It should be recalled that the U.S. Bill of Rights, as originally added to the Constitution in 1791, applied only to actions of the national government.[28] For protection against state action, individuals had to look to the bills of rights of the state constitutions. This situation began to change in 1925, some 57 years after the adoption of the Fourteenth Amendment. Although the U.S. Supreme Court was originally hesitant to use the due process and equal protection clauses as grounds for striking down state action as violative of the U.S. Bill of Rights,[29] beginning in 1925[30] the Court started the gradual process of incorporating provisions of the original Bill of Rights within the meaning of the Fourteenth Amendment, thereby making most provisions of the Bill of Rights as fully applicable against state action as they are against national action.

Furthermore, beginning in the 1950s and accelerating during the 1960s, the Court generally gave broad interpretations to most of the provisions of the Bill of Rights[31]—now made applicable against the states through the process of "selective incorporation."

The Supreme Court, as well as other federal and even state courts, also discovered what might be called "new rights" within the Constitution—the right of non-English speaking school children to be instructed in a language they can understand,[32] the right of mental patients to treatment,[33] the right of prisoners to be free of cruel and unusual punishment,[34] and the right of married couples to privacy.[35]

Finally, the Court found new meaning in the equal protection clause of the Fourteenth Amendment. In addition to striking down state-imposed racial segregation in the schools,[36] the Court ordered the reapportionment of state legislatures according to the principle of "one man, one vote."[37] The Court also struck down many state laws giving preference to men over women,[38] and held that indigent defendants have a right to counsel to appeal their convictions.[39]

Taken together, these four elements constitute the "revolution in civil rights and liberties" of the Warren Court era. Although these developments had their critics,[40] supporters argued that they were long overdue, because if these unpopular causes were not championed by the Supreme Court of the United States, they were unlikely to receive serious consideration at all.[41] Whatever merit this argument might have had in the 1950s and 1960s, it needs to be reevaluated in the context of the 1980s. Two important changes appear to make it somewhat less compelling.

First, state political processes are more receptive to the claims of minorities than they were during the 1950s and 1960s. The right to vote is much more widespread,[42] legislatures are more representative,[43] governors have gained more control over their administrations,[44] civil services have been modernized,[45] state courts have been unified and professionalized,[46] and, most generally, a wide range of interest groups now participate in what have become much more open political and governmental processes.[47]

Second, the nature of civil liberties issues is different in the 1980s. For example, rights protecting citizens against blatant racial and sexual discrimination, third-degree police tactics, and the suppression of books dealing with sex are all well established. While one should be "eternally vigilant"[48] against any erosion of these basic rights, many of today's issues of civil rights and liberties are both more subtle and more complicated than those of the past. For example, today's issues of civil rights and liberties often involve a conflict between rights. What should one do, for example, when the claimed right of a journalist to withhold news sources in the name of freedom of the press conflicts with the right of a criminal defendant to all information to plan his or her defense?[49] Or when the right of students to pray on the grounds of a public university in the name of religious freedom clashes with the right to be free of a religious establishment?[50] Or when the right of a newspaper to publish conflicts with an individual's claim of privacy?[51] These are not issues of balancing society's need for security and order against the liberty of an individual; rather, they involve the claim of one individual to a civil liberty against a similar claim by another. At the same time, determining an appropriate remedy for an alleged violation of rights has become more complicated. There is, for example, considerable dispute about the efficacy of the exclusionary rule as a remedy to the problem of unreasonable searches, especially when the violation appears more technical than willful.[52] Other difficult problems of remedy arise in prisoners' rights cases[53] and some gender equity cases.[54]

These two developments of the 1980s—the increased responsiveness of state political processes to civil liberties claims and the complexity of the issues themselves—may call into question the traditional justification for federal judicial activism offered in the 1960s. At least it should suggest the need for experimentation with both forums and solutions.

There is some evidence that the U.S. Supreme Court has become sympathetic to these changes and is more willing to defer to the states on matters of civil rights and liberties. For example, the Court now may be somewhat more accepting of the standards of local communities in obscenity cases[55] and substantially less willing to see cases transferred from state to federal courts in *habeas corpus* and other proceedings.[56] Even more important, however, is the apparent willingness of the Court to see cases decided on state constitutional grounds without review by the Supreme Court.[57] One must be careful not to overestimate this tendency, but the trend does seem to provide increased opportunities for states to deal with today's complicated issues of civil rights and liberties on the basis of their own constitutions, traditions, and standards.

While some observers applaud this "new judicial federalism," which would give greater scope to the states in defining civil rights and liberties, others doubt the capacity of the states to protect these rights adequately. There is no a priori answer to this question of whether the states will protect civil rights and liberties; instead, one must look to the record of state constitutions, state judiciaries, and state political processes.[58]

The Nature of State Constitutions

State constitutions differ from the Constitution of the United States in several ways. First, the Constitution of the United States, by and large, delegates authority to the national government. As is well known, the national government has only those powers delegated to it by the Constitution. The states and their citizens retain all powers not delegated to the national government or prohibited specifically to them. This means that state constitutions are more likely to contain *limits* on governmental authority than is the case with the national Constitution.

Second, state constitutions must deal with matters barely touched on in the U.S. Constitution. State constitutions, for example, have detailed provisions on local government, elections, public education, and land management.

Third, state constitutions may be based on different understandings and philosophies of government.[59] The Constitution of the United States is based on a Federalist conception of the separation of powers, with a single strong chief executive, a bicameral legislature in which the states are represented equally in one chamber, and life tenure for judges. State constitutions, on the other hand, may divide executive authority among several statewide elected officials and provide for the election of judges.

Fourth, state constitutions are easier to amend and change than is the U.S. Constitution. In fact, the 50 American states have had a total of 146 different constitutions since 1775.[60] It may be that the relative stability of the U.S. Constitution has been made possible, in part, because of the capacity of the states to adopt new constitutions to meet changing social and economic conditions.

Fifth, unlike the U.S. Constitution, state constitutions provide for direct citizen participation in the process of amendment and change. All state constitutions provide for citizen ratification of proposed constitutional amendments; 17 even provide for the initiation of amendments directly by the voters, thus bypassing the legislature altogether.[61]

Sixth, because state constitutions must contain limits on government, and because they are relatively easy to amend, some commentators have observed that state constitutions tend to become "cluttered" with details that would be best left to statutory law.[62] Although this charge can easily be exaggerated, it is true that state constitutions contain much more detail than does the Constitution of the United States. This detailed nature of state constitutions has important consequences for state judiciaries and for the practice of judicial review.

Finally, state bills of rights are often different from the U.S. Bill of Rights. Many state civil rights and liberties provisions are more detailed than are their counterparts in the U.S. Constitution. This is frequently the case with state provisions protecting against an establishment of religion, for example.[63] Sometimes the language of state bills of rights appears to go beyond what is required in the U.S. Constitution. Free speech provisions and guarantees of political participation are often of this nature.[64] Most state constitutions contain rights provisions for which there are no counterparts in the U.S. Constitution. For example, 40 constitutions guarantee a right to education, and 19 contain an explicit right to be free of gender discrimination.[65] Again, these differences have important implications for state courts.

State Courts and State Constitutions

The Constitution of the United States requires that state court judges "be bound by Oath or Affirmation, to support this [the U.S.] Constitution."[66] In implementing this requirement, state constitutions usually require state judges to take a specified oath swearing fidelity to both the U.S. Constitution and the state constitution. For instance, the Pennsylvania Constitution prescribes the following oath for judges: "I do solemnly swear (or affirm) that I will support, obey, and defend the Constitution of the United States and the Constitution of this Commonwealth. . . ."[67] Given that the supremacy clause of the U.S. Constitution provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land," state judges, in cases of a conflict between their two loyalties, must give precedence to the U.S. Constitution and law. In fact, the U.S. Constitution makes this requirement explicit. After declaring the Constitution and laws of the United States to be supreme, it goes on to provide that the "Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[68] Yet, even with the clear supremacy of the U.S. Constitution, this does not answer the question of whether state judges should look first to the U.S. Constitution or to the constitution of their state when it is claimed that a state action violates both.

Prior to the ratification of the Fourteenth Amendment in 1868, state judges, quite naturally, looked to their state constitutions because there was little in the U.S. Constitution to limit state action.[69] Later, when the U.S. Supreme Court began to find such protections in the Fourteenth Amendment—first for property rights and then for personal liberties—state judges also turned to the U.S. Constitution.[70] After 1937, the U.S. Supreme Court held that the Fourteenth Amendment does not limit state economic regulation, except in the most unusual situations. State court judges, because they are bound by the Supreme Court's interpretations of the U.S. Constitution, likewise turned from the Fourteenth Amendment as a defense of property rights against state action but, of course, continued to use their state constitutions as property rights were challenged by increasingly active state governments.

Similarly, as the Warren Court expanded the scope of national constitutional protections for personal liberties, state judges also turned to the U.S. Constitution when confronted with cases involving personal liberties. In part, this tendency to look to the U.S. Constitution resulted from the nature of the legal strategy employed: because federal constitutional rights were so broadly interpreted by the U.S. Supreme Court, lawyers naturally argued their client's cause on the basis of the U.S. Constitution. State constitutional issues, when they were raised at all, were often seen as secondary.

Furthermore, state court judges began to interpret state constitutional provisions as identical to equivalent national constitutional provisions. For example, the language of Section 8 of the Pennsylvania Constitution's Declaration of Rights—dealing with searches and seizures—is similar to the language of the Fourth Amendment to the U.S. Constitution; consequently, Pennsylvania judges have tended to interpret Section 8 in precisely the same way as federal judges have interpreted the Fourth Amendment. Clearly, Section 8 of the Pennsylvania Constitution could not have been interpreted to deny rights protected by the Fourth Amendment of the U.S. Constitution. At the same time, Section 8 could have been interpreted by Pennsylvania judges to guarantee rights beyond what might be required by the Fourth Amendment.

This raises the difficult issue of "floors and ceilings." If state judges view state constitutional provisions as identical to U.S. constitutional provisions, then interpretations by the U.S. Supreme Court become both the floor and the ceiling for the states. However, if state court judges interpret state constitutional provisions independently of the way in which the U.S. Supreme Court interprets the U.S. Constitution, then U.S. Supreme Court interpretations impose a floor only, and the states are free to develop an independent constitutional law that goes beyond that of the U.S. Supreme Court. At least this is the view of a number of state supreme court justices, including Hans Linde of Oregon, Stanley Mosk of California, Robert N. C. Nix, Jr., of Pennsylvania, and Robert Utter of Washington.

Interpreting state bills of rights independently of the U.S. Bill of Rights also raises once again the problem of uniformity versus diversity. Should American citizens have precisely the same civil rights and liberties regardless of where they live? Or should the states continue to play a role in defining civil rights and liberties? If the latter position is admitted, what should be the role of the U.S. Supreme Court in setting basic standards for civil rights and liberties? Because the American federal system is predicated on a pragmatic and dynamic balancing of uniformity and diversity, one should not be surprised to find these difficult considerations arising here.

State Constitutional Law and American Federalism

The development of an independent state constitutional law has important implications for American federalism, implications that go beyond the issues of personal rights and liberties. For example, an independent state constitutional law reaffirms the role of the states as laboratories. It has been argued that today's issues of civil rights and liberties are extraordinarily complicated, often pitting one personal liberty against another. Even the most ardent civil libertarians disagree on how to resolve such issues as free press versus fair trial or the free exercise of religion versus the establishment of religion. These are conflicts in which society might benefit from experimenting with a variety of solutions in different settings without imposing a single uniform national standard. Even beyond issues of civil rights and liberties, experimentation seems a necessity when confronted with such issues as balancing legislative and executive control over bureaucracy or how to achieve equity in educational finance.

In addition, an independent state constitutional law would foster diversity, one of the key values underlying federalism itself. One should not assume that uniformity in constitutional doctrine means better constitutional doctrine. Many contemporary constitutional issues admit of a variety of solutions, no one of which is necessarily better than another, only different.

Third, the development of an independent state constitutional law would reinforce the role of the states as polities. Earlier in this chapter, it was argued that the principal role of the states in the American federal system is to make policy for their own citizens in keeping with their own needs and traditions. Constitutional policymaking, no less than legislative and executive policymaking in such fields as education, social welfare, and domestic relations, is an attribute of being a polity. This must not be taken to mean that the states are "sovereign," at least in the classic sense of that word. The American states exist within the framework of the Constitution of the United States, whose supremacy clause assures the superiority of constitutionally legitimate national laws. Nevertheless, no matter how broadly we interpret the powers delegated to the national government, our constitutional bargain assures a considerable policymaking role for the states.

Finally, an independent state constitutional law can be supportive of democracy itself. Constitutions address the most fundamental political questions: what public policies are legitimate, how is political conflict managed and organized, and what are the very purposes of the political community? In the American states, citizens write and approve constitutions, ratify amendments through direct participation, and, in most states, play a role in selecting or retaining the judges who interpret the constitutions. These matters of constitutional choice are at the very heart of democracy. Without vital state constitutions and constitutional development, American citizens would be denied any opportunity to participate in this most basic decisionmaking process.

The Organization of this Study

This study is organized into four parts. Part I, which includes this chapter and the next, explores the role of state constitutions and constitutional law in the American federal system and the contemporary opportunities for the development of an independent state constitutional law. Part II, which includes chapters 3 through 7, explores how state courts have addressed fundamental constitutional issues, including the organization of state government, civil rights and liberties, equality, criminal procedure, and property rights. Part III, chapters 8 and 9, deals with how the development of an independent state constitutional law affects selected areas of public policy—in this case workmen's compensation and educational reform. Finally, Part IV, chapter 10, presents the conclusions of the study.

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[1] For other overview treatments, see U.S. Advisory Commission on Intergovernmental Relations, *State Constitutional Law: Cases and Materials* (Washington, DC: ACIR, M-159, October 1988), and *The Question of State Government Capability* (Washington, DC: ACIR, A-98, January 1985), pp. 27-63; John Kincaid, ed., "State Constitutions in a Federal System," *The Annals of the American Academy of Political and Social Science* 496 (March 1988): entire issue; "New Developments in State Constitutional Law," *Publius: The Journal of Federalism* 17 (Winter 1987): entire issue; and Bradley D. McGraw, ed., *Developments in State Constitutional Law* (St. Paul: West Publishing Co., 1985).

[2] U.S. Advisory Commission on Intergovernmental Relations, *Changing Public Attitudes on Governments and Taxes*, 1988 (Washington, DC: ACIR, S-17, 1988), pp. 6-7 and 33-34.

[3] For a description of the writing and ratification of the Massachusetts Constitution, see Paul C. Reardon, "The Massachusetts Constitution Marks a Milestone," *Publius: The Journal of Federalism* 12 (Winter 1982): 45-56. For fuller treatment, see Ronald M. Peters, *The Massachusetts Constitution of 1780: A Social Compact* (Amherst: University of Massachusetts Press, 1979). The Massachusetts Constitution of 1780 now has 117 amendments.

[4] For a complete chronology of state constitution writing, see Albert L. Sturm, "The Development of American State Constitutions," *Publius: The Journal of Federalism* 12 (Winter 1982): 57-98.

[5] See the comparisons drawn by James Madison and Alexander Hamilton in *Federalist #50* and *Federalist #85*, in Jacob E. Cooke, ed., *The Federalist* (Middletown, Con-

necticut: Wesleyan University Press, 1961), pp. 343-347 and 587-595.

[6] Donald S. Lutz, "The Purposes of American State Constitutions," *Publius: The Journal of Federalism* 12 (Winter 1982): 27-44. See also the same author's "The United States Constitution as an Incomplete Text," *Annals of the American Academy of Political and Social Science* 496 (March 1988): 23-32.

[7] For a discussion of the American states as "polities," see Daniel J. Elazar and Stephen Schechter, *The Role of the States as Polities in the American Federal System* (Philadelphia: Center for the Study of Federalism, 1982), esp. pp. 4-19.

[8] For a discussion of Indian federalism, see D. D. Basu, *Introduction to the Constitution of India* (New Delhi: Prentice Hall of India Private Ltd., 1985).

[9] For a discussion of the relationship between national and state constitutional law in Brazil, see Antonio Rulli, Jr., "Federal and State Law in the Brazilian Federal System," paper presented at the meeting of the Comparative Federalism Research Group, Philadelphia, PA, 1987.

[10] Constitution of the United States, Article I, Section 10.

[11] For a good discussion of this "umpiring function, see John R. Schmidhauser, *The Supreme Court as Final Arbiter of Federal-State Relations* (Chapel Hill: University of North Carolina Press, 1958).

[12] ". . . nor shall private property be taken for public use without just compensation." Amendment V.

[13] ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the Laws." Amendment XIV.

[14] "No state shall pass any 'Law impairing the Obligation of Contracts. . . .' " Article I, Section 10.

[15] "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Article IV, Section 2.

[16] Congress shall have the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Article I, Section 8. As early as 1851, the U.S. Supreme Court held that under certain circumstances, this power is exclusive with Congress and, even in the absence of national law, state regulation may still be prohibited, but under other circumstances, state regulation is permissible—giving rise to what has been called "the dormant power of the commerce clause." See Cooley v. Board of Wardens, 53 U.S. 299 (1851). See also Southern Pacific Company v. Arizona, 325 U.S. 761 (1945), and Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959).

[17] "No State shall, without the Consent of Congress, lay any Impost or Duty on Imports or Exports, except where may be absolutely necessary for executing its inspection laws. . . ." Article I, Section 10.

[18] Beginning with West Coast Hotel v. Parrish, 300 U.S. 399 (1937), the Supreme Court reversed a long string of precedents and began to reject constitutional objections to state economic regulation based on the due process clause of the Fourteenth Amendment. The situation with regard to claims brought under the equal protection clause is somewhat more complicated. For discussion of the latter issue, see Railway Express Agency v. New York, 336 U.S. 106 (1949), and Morey v. Doud, 354 U.S. 457 (1957).

[19] See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), and Nollan v. California Coastal Commission, 107 S.Ct. 3141 (1987). See also Lee P. Symons, "Property Rights and Land Use Regulation: *First English* and *Nollan*," *Publius: The Journal of Federalism* 18 (Summer 1988): 81-96.

[20] See Southern Pacific Company v. Arizona.

[21] See Philadelphia v. New Jersey, 437 U.S. 617 (1978), for example.

[22] It was on this point that the U.S. Supreme Court ultimately decided the case of Gibbons v. Ogden, 22 U.S. 1 (1824).

[23] For two attempts to articulate such standards, see Hines v. Davidowitz, 312 U.S. 52 (1941), and Pennsylvania v. Nelson, 350 U.S. 497 (1957). See chapter 2 of this report for a fuller treatment.

[24] See his dissenting opinion in City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973). See also Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corporation, 56 U.S.L.W. 4307 (1988).

[25] See, for example, Carter v. Carter Coal Company, 298 U.S. 238 (1936).

[26] National League of Cities v. Usery, 426 U.S. 833 (1976). But see also Garcia v. San Antonio Metropolitan Transit Authority, 105 S.Ct. 1005 (1985), reversing Usery.

[27] Indeed, this was the precise argument of the majority in Garcia.

[28] This was reaffirmed in Barron v. Baltimore, 32 U.S. 243 (1833).

[29] One of the earliest cases raising the issue of the impact of the Fourteenth Amendment on the Bill of Rights was the Slaughter House Cases, 83 U.S. 36 (1873). See also Twining v. New Jersey, 211 U.S. 78 (1908), Palko v. Connecticut, 302 U.S. 319 (1937), and especially Adamson v. California, 332 U.S. 46 (1947).

[30] Gitlow v. New York, 268 U.S. 652 (1925), in which the Supreme Court "incorporated" freedom of speech among the "liberties" protected by the due process clause of the Fourteenth Amendment.

[31] See, for example, Camara v. Municipal Court, 387 U.S. 523 (1967), Chimel v. California, 395 U.S. 752 (1969), Katz v. United States, 389 U.S. 347 (1967) and Miranda v. Arizona, 384 U.S. 436 (1966).

[32] Lau v. Nichols, 414 U.S. 563 (1974).

[33] See, for example, New York Association for Retarded Children v. Rockefeller, 356 F.Supp. 752 (1973).

[34] Holt v. Sarver, 505 F.2d 194 (1974), for example. Also, see generally, Ellis Katz, "Prisoners' Rights, States' Rights and the Bayh-Kastenmeier Institutions Bill," *Publius: The Journal of Federalism* 8 (Winter 1977): 179-198.

[35] Griswold v. Connecticut, 381 U.S. 479 (1965).

[36] Brown v. Board of Education, 349 U.S. 294 (1954).

[37] Baker v. Carr, 369 U.S. 186 (1962).

[38] Reed v. Reed, 404 U.S. 71 (1971), for example.

[39] Douglas v. California, 372 U.S. 353 (1963).

[40] See Clifford M. Lytle, *The Warren Court and Its Critics* (Tucson: University of Arizona Press, 1968).

[41] This is one of the principal arguments of John Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980).

[42] See Malcolm E. Jewell and David M. Olson, *American State Political Parties and Elections* (Homewood, Illinois: The Dorsey Press, 1982).

[43] See Malcolm E. Jewell, *Representation in State Legislatures* (Lexington: University of Kentucky Press, 1982).

[44] See Larry Sabato, *Goodbye to Good-Time Charlie: The American Governorship Transformed* (Washington, DC: CQ Press, 1983).

[45] See Mavis Mann Reeves, "Look Again at State Capacity," in Robert J. Digler, ed., *American Intergovernmental Relations Today* (Englewood Cliffs, New Jersey: Prentice-Hall, 1986), pp. 143-159, esp. 153-154.

[46] See Larry Berkson and Susan Carlton, *Court Unification: History, Politics and Implementation* (Washington, DC: Government Printing Office, 1978).

[47] See Charles Press and Kenneth VerBurg, *State and Community Governments in the Federal System* (New York: John Wiley and Sons, 1983), pp. 455-494.

[48] "Eternally Vigilant" is the motto of the American Civil Liberties Union.

[49] See New York Times v. Jascalevich, 439 U.S. 1301 (1978).

[50] See Widman v. Vincent, 454 U.S. 263 (1981).

[51] The classic discussion is still Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4 (1890). See also the discussion in William Cohen and John Kaplan, *Constitutional Law: Civil Liberty and Individual Rights* (Mineola, New York: The Foundation Press, 1982), pp. 181-193.

[52] See Thomas Y. Davies, "A Hard Look at What We Know (and Still Need to Learn) about the 'Costs' of the Exclusionary Rule," *American Bar Foundation Research Journal* (1983): 611-690.

[53] See Ellis Katz, "Prisoners' Rights, States' Rights."

[54] See City of Los Angeles v. Manhart, 435 U.S. 202 (1978), for example.

[55] Miller v. California, 413 U.S.15 (1973), although the U.S. Supreme Court seems to have retreated from this position.

[56] See, for example, Stone v. Powell, 428 U.S. 465 (1976).

[57] See Michigan v. Long, 463 U.S. 1032 (1983).

[58] In fact, there is some evidence that state supreme courts may be just as vigilant about protecting individual liberties as is the U.S. Supreme Court. See Craig R. Ducat, Mikel L. Wyckoff and Victor E. Flango, "Can State Judges Be Trusted to Defend Federal Constitutional Rights?" Paper delivered at the 1988 Annual Meeting of the American Political Science Association, Washington, DC.

[59] For a fascinating typology of state constitutional traditions, see Daniel J. Elazar, "Principles and Traditions Underlying State Constitutions," *Publius: The Journal of Federalism* 12 (Winter 1982): 11-26.

[60] Albert L. Sturm, "The Development of American State Constitutions." But Sturm does not include the Connecticut and Rhode Island charters as constitutions, and his survey was completed before the adoption of the Georgia Constitution of 1982. Therefore, the correct number might be 148 rather than 145. See also the information regularly provided by the Council of State Governments in its annual *Book of the States.*

[61] *Book of the States, 1988-89* (Lexington, KY: Council of State Governments, 1988), p. 18.

[62] See, for example, John J. Harrigan, *Politics and Policy in States and Communities* (Boston: Little Brown and Company, 1984), esp. pp. 19-34.

[63] See G. Alan Tarr, "Religion under State Constitutions," *Annals of the American Academy of Political and Social Science* 496 (March 1988): 65-75.

[64] For example, Article I, Section 5 of the Michigan Constitution provides: "Every person may freely speak, write, express, and publish his views on all subjects, being responsible for the abuse of that right. . . ."

[65] For example, the Pennsylvania Constitution provides: "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." (Article III, Section 14); "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. . . ." (Article I, Section 27); and "Equality of rights under the law shall not be denied or abridged in the Commonwealth because of the sex of the individual." (Article I, Section 28).

[66] Constitution of the United States, Article VI, Section 2.

[67] Constitution of Pennsylvania, Article VI, Section 3.

[68] Constitution of the United States, Article VI, Section 2.

[69] Unfortunately, this is an area that is not studied adequately. But see David B. Rabban, "The First Amendment in its Forgotten Years," *Yale Law Journal* 90 (January 1981): 514-595, and Edward S. Corwin, *Liberty against Government* (Baton Rouge: Louisiana State University Press, 1948).

[70] In fact, the process may have worked just the other way, with federal judges borrowing the concept of substantive due process from state constitutional developments. It may be that the concept was first articulated in New York in Wynehamer v. People, 13 N.Y. 378 (1856). See Corwin, *Liberty against Government. . . .*

Chapter 2

Powers of and Restraints on "Our Federalism": State Authority under the Federal Constitution

In 1971, Justice Hugo Black wrote of "Our Federalism" as "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."[1] In 1971, however, it was not yet clear that the U.S. Supreme Court had consecrated a new era of greater, though still bounded, federal constitutional support for state regulatory powers. During the past one-and-one-half decades, the U.S. Supreme Court has recast the nation's image of the U.S. Constitution and has redefined its own authority to interpret the Constitution. These developments should have special meaning for state governments. From the federal judiciary's recognition of constitutionally expansive federal administrative authority in 1937[2] to the late 1970s, the federal constitutional landscape was not as hospitable to state exercises of broad police and economic regulatory powers as it is today with the Supreme Court's new solicitude for "Our Federalism."

"Our Federalism" has operated on several fronts in federal constitutional doctrine. The Burger Court substantially tempered the activist role that the Warren Court had asserted in expanding individual rights guarantees. In turn, the Rehnquist Court has marginalized the force and reversed the momentum of Warren Court precedents in many areas,[3] including criminal procedure,[4] constitutional privacy,[5] and Fourteenth Amendment state action[6] and equal protection doctrines.[7] At the same time, the Court has acknowledged the potential for independent state protection of individual liberties under state constitutional, statutory, and common law.[8] Additionally, although a narrow majority of the Burger Court refused to continue to enforce substantive restraints on Congress' commerce powers in the interests of state governments,[9] the Court may be willing to scrutinize the congressional procedures for enacting commerce legislation that directly burdens the states.[10] Moreover, the Supreme Court has limited the access of individual rights plaintiffs to the federal courts, in part by strengthening the procedural barriers of standing[11] and by broadening constitutional preferences for state court powers in the doctrines of adequate and independent state law grounds, state sovereign immunity, abstention, and equitable restraint.[12]

The Supreme Court's heightened sensitivity to "Our Federalism" yields much ground for activism to states in the development of their own constitutional law. To some extent, state courts have responded to the clarion call for leadership in the field of individual rights protection.[13] Yet, vast territories of state constitutional law remain to be explored by state legislatures, in their economic and civil liberties policymaking, and by state courts, in their interpretation of the mandates of their own constitutions.[14] Particular opportunities—and the nature and scope of state authority to exploit them—will be examined in the following chapters of this book.

This chapter serves merely to sound a warning. In the stir of a much warranted enthusiasm for state constitutional law development, it must be remembered that "Our Federalism" embodies restraints on state authority as well as powers. Inherent in cooperative federalism is an expectation that the federal Constitution will furnish a "floor of security" for the interests of life, liberty, and property below which the states cannot fall in ordering their policy priorities through state law, including state constitutional law.

Generous as the U.S. Supreme Court has been of late in sanctioning the independent evolution of state constitutional law, its recent construction of several federal constitutional doctrines has not been wholly congruent with this attitude. Sound leadership of the state constitutional law movement depends on careful study of the ambiguities in these federal doctrines, which may limit all branches of state government in their lawmaking authority, or affect only the state judiciary in its authority to declare state constitutional law.

Brief analyses of the most relevant of these doctrines follow.[15] The first section examines the contours of major federal constitutional doctrines that channel the economic and police powers of state legislatures, executives, administrative agencies, and courts. In order of treatment, they include the preemption doctrine, the dormant commerce clause doctrine, and the takings clause, and economic due process and equal protection doctrines. The second section describes federal constitutional boundaries on the authority of state courts to interpret state law, including state constitutional law. They involve the adequate and independent state grounds doctrine, and various abstention and equitable restraint doctrines.[16]

Restraints on State Economic and Police Regulation

Preemption Doctrine

The preemption doctrine is rooted in the supremacy clause of the U.S. Constitution.[17] Because federal law is supreme within the realm of its constitutional authority, state law that interferes with the operation of federal law or that intrudes in the realm of federal law can be invalidated by the courts. The supremacy clause is the basis on which the federal and state legislatures and judiciaries delineate the spheres of regulatory power that are delegated exclusively to the federal government and those spheres of concurrent and supplementary federal and state governmental activity. Accordingly, the preemption doctrine is one of the primary constitutional vehicles by which the Constitution defines the profile of "Our Federalism."

The preemption doctrine identifies two general grounds on which federal law can preempt state law, including state constitutional law. First, Congress may preempt an entire regulatory area within its constitutional authority and prevent state involvement, regardless of the compatibility of state activity with federal rules and objectives, by establishing its decision to "occupy the field." Second, even where Congress has not displaced state activity in a field of regulation entirely, state law that is in "actual conflict" with federal law may be preempted.

In using the first ground, the judiciary examines a federal statute to determine whether Congress "intended" to occupy the regulatory field. Of course, explicit statutory language may define the extent to which the enactment preempts state law.[18] Even in the absence of such language, however, an intent to occupy the field may be inferred where a scheme of federal regulation is so pervasive as to preclude supplementation by the states,[19] or where the area is traditionally left to federal control.[20]

The judiciary may find state regulation in "actual conflict" with federal law on a number of bases. Preemption most likely occurs when federal and state laws give rise to conflicting obligations, thus making it impossible for those who are subject to regulation to comply with both federal and state rules.[21] Even when federal and state laws are not contradictory on their face, a state regulation may be invalidated if it conflicts with the aims of federal law, and is, thereby, an obstacle to the accomplishment of the full purposes and objectives of Congress.[22]

These standards have not been applied in a uniform and consistent manner over time. Indeed, in any particular era, the Supreme Court's approach under the preemption doctrine appears to reinforce whatever theory of federal-state relations holds sway in constitutional interpretation at the time of a decision.[23] Whereas the Court's earlier views of federalism were bolstered by a presumption of federal preemption in any subject area regulated by Congress,[24] the current judicial view of "cooperative federalism"[25] may be driving the Court's recent preemption decisions. Since 1973,[26] the preemption doctrine has embodied a state-protective presumption: the traditional economic and police powers of the states will not be superseded by federal law unless Congress clearly and manifestly establishes its intent to preempt state law.[27]

This presumption is evident in both grounds of the preemption doctrine. Federal "occupation of the field" will not likely be implied merely from the existence of a federal regulatory scheme.[28] Rather, federal exclusivity may depend on a clear statement, found in the text or legislative history of a congressional enactment, of the national objective to preempt all state regulations of the subject area.[29] In the absence of such an express provision, the parameters of federal exclusivity may be limited to those discrete aspects of an industry that are extensively and comprehensively regulated in the federal statute.[30] Similarly, the second ground of "actual conflict" appears to be restricted to cases in which compliance with both state and federal regulations is a physical impossibility[31] (or an "imminent impossibility"[32]), and in which the state regulation directly and substantially frustrates the purposes of federal law.[33]

Thus, the current preemption doctrine generally accommodates more expansive police and economic regulatory authority in state governments, even in subject areas affected by federal law. In summary, the probability that a state constitutional grant of authority to state and local governments or the police, and economic measures enacted or enforced under such a grant, will be preempted by federal law decreases with the aggregate of the following variables: the state constitutional grant or administrative measure (1) regulates a subject matter traditionally left to the states, (2) has historic police power objectives concerning health, safety, or morals, (3) has objectives that are compatible with or supplemental to the purposes for any federal regulation in the subject area, (4) is in a subject area that has not been preempted explicitly by federal law, and (5) affects dimensions of an activity that have not been regulated comprehensively by federal law.

Dormant Commerce Clause Doctrine

Federal constitutional powers that lie "dormant" are those that have been granted to the federal government but are not currently being used. Even in the absence of federal regulation that could preempt the operation of state law, dormant constitutional powers might be enforced by the judiciary to limit state authority. Only one constitutional grant of federal power has given rise to substantial litigation under the concept of dormant powers—the commerce clause.[34] The Supreme Court has interpreted the constitutional grant of congressional commerce power to imply corollary restraints on state authority to regulate certain interstate economic transactions that Congress has not attempted to control.[35]

The dormant commerce clause doctrine essentially furthers the federal interest in the national free trade unit: it prevents the states from erecting barriers to the movement of goods and services across state lines.[36] By challenging state regulations that aim to protect local markets and industries from interstate competition, the doctrine curbs sister-state retaliation and economic balkanization.[37] On the assumption that congressional "silence" in the face of parochial state legislation does not amount to federal approval of local economic protectionism,[38] the judiciary stands in the stead of Congress to keep the channels of interstate commerce free of state-created obstacles.[39]

The Supreme Court has developed three categories of analysis in dormant commerce clause litigation. First, state economic regulation is suspect if it discriminates against interstate commerce. A scheme is likely to be characterized as discriminatory if, on its face, it treats out-of-state competitors differently than in-state enterprises by imposing greater economic burdens on the out-of-state interests;[40] even a facially neutral scheme may be suspect if, in its operation, it so substantially and disproportionately disfavors out-of-state interests as to evidence a clear state purpose to discriminate against interstate commerce.[41] Once identified as discriminatory, a state economic regulation typically will be invalidated, unless the state can demonstrate that the scheme was designed to serve a legitimate purpose other than protection of the economic interests of its own residents, such as the promotion of a significant local safety or health objective.[42] Even if the state law promotes a non-protectionist purpose, differing treatment for out-of-state goods and ventures must be justified for some reason apart from their state of origin.[43] In all probability, a state economic regulation found to discriminate against interstate commerce will run afoul of the commerce clause.[44]

Although a particular measure may not be discriminatory when viewed in isolation because it treats in-state and out-of-state enterprises in an evenhanded manner, it may nonetheless adversely affect only the economic interests of multistate businesses when considered in the aggregate of all applicable state regulations that the businesses must observe. Accordingly, the second category of dormant commerce clause cases restrains state economic schemes that subject interstate commercial activities to conflicting or inconsistent regulations from state to state. In such cases, of course, a state regulation favors localized commerce by imposing cumulative burdens on national enterprises. Typically, the judiciary requires either a showing of actual conflict among state regulations[45] or of direct regulation of extraterritorial trade[46] to invalidate a state economic regulation on this basis.

The third category of analysis evaluates whether a state rule that is neither discriminatory nor inconsistent with sister-state schemes places economic burdens on interstate commerce that clearly exceed the local benefits obtained. Under this "balancing" approach, the judiciary assesses the nature and the significance of the state's regulatory interests as compared to the extent of the monetary burdens and economic inefficiencies imposed on interstate commercial transactions.[47] The continuing viability of this approach for enforcement of the commerce clause is in some doubt. Of late, a significant minority of the Supreme Court has opposed the balancing approach, arguing that the judiciary is institutionally incompetent to weigh the relative benefits and burdens of state economic regulations.[48] In this regard, judicial skepticism is supported by theoretical arguments that dormant commerce clause analysis requires courts to operate in a quasi-legislative capacity that is explicitly disavowed in other constitutional areas.[49]

In the last decade, a major "loophole" in dormant commerce clause restraints has amplified the federal constitutional authority of state governments to favor local economic interests. The "market participant" exception allows the states to burden interstate commerce—indeed, to discriminate against out-of-state business concerns in an open and overt manner—provided the state itself has "entered the market" by subsidizing private businesses[50] or by operating a business as a proprietor.[51] The analytic distinction between the state as a "market participant" (i.e., when state activities will not be subject to dormant commerce clause restrictions) and the state as a "market regulator" (i.e., when state activities will be amenable to doctrinal restrictions) is not a bright line, however. Should a state exploit its economic clout to discriminate against commercial transactions occurring beyond its territorial jurisdiction and outside of the particular market in which it is contracting, its behavior may be deemed "downstream regulation" rather than market participation.[52]

Consistent with the state-protective presumption in the contemporary preemption doctrine, the current doctrine of the dormant commerce clause promises a broad range of state governmental discretion in economic regulation when Congress has not acted to control the field of interstate commerce. Even if the Supreme Court does not totally abandon the balancing approach in dormant commerce clause analysis, its increased deference to state governmental rulemaking in the commercial realm enhances the opportunities for innovative state economic policy under state constitutional and statutory law. In general, a state constitutional grant of economic regulatory powers, or a state constitutional restraint on public and private economic transactions, or any legislative or administrative measure implementing such powers is likely to survive challenge despite its effects on interstate commerce, provided: (1) it is designed to promote traditional police power objectives, such as health or safety, rather than the business interests of its own residents; (2) it treats out-of-state and in-state economic entities evenhandedly; and (3) it does not vary from national standards to such an extent that it imposes conflicting obligations or cumulative burdens on multistate businesses.

Takings Clause Doctrine

The Fifth and Fourteenth Amendments of the federal Constitution limit the governmental power of eminent domain:[53] government may "take" private property, but only for a "public use"; even then, the taking must be accompanied by "just compensation." By conditioning the power of eminent domain on both the demonstration of a public purpose and the government's willingness to pay, the takings clause theoretically promotes several objectives: an expenditure of public monies should secure a public gain, and not merely benefit a politically powerful interest group;[54] moreover, a public good should not be extorted from any discrete and identifiable individuals, but financed by the public at large.[55]

As the Supreme Court has interpreted the takings clause, the legitimacy of a state's exercise of eminent domain can be challenged on four grounds: first, the state has "taken" the property, rather than merely regulated its use by private owners and operators; second, the state cannot establish that the property was taken for a "public use"; third, the state cannot demonstrate that the taking is sufficiently related to the public purpose to be justifiable; fourth, the state has not provided adequate compensation, whether in cash or in kind. As to most of these issues, the takings clause doctrine is both unsettled and opaque.[56] Recent developments in the takings clause, which may have particular impact on state land-use regulation, highlight the importance of unraveling its tangled doctrines, however.

The first question—whether the state has "taken" or merely "regulated" private property—is crucial, for only in the case of a "taking" is the government required to pay compensation for controlling or burdening the private uses of property. The border between a "taking" and a "regulation" of private property is not marked by any bright and definitive line; nevertheless, it is possible to identify polar positions and characteristic attributes in light of which a state activity can be deemed a "taking" or a "regulation."

The classic case of a "taking" is the state's permanent and physical occupation of private property.[57] Without regard to the importance of the public interests served, or to the severity of the imposition on the landowner's usual and expected functions, a state's permanent trespass and appropriation of property is virtually certain to be found a "taking."[58] In opposition, the classic case of a "regulation" of private property is the state's prohibition of a noxious use or nuisance.[59] Of course, when the state banishes or controls a "harmful" use of private property, it may be favoring an alternative private use to which surrounding property had been or will be committed; traditional police powers have been stretched conceptually to include regulatory zoning that benefits a conforming private use, even when the nonconforming use was not recognized as a public or private nuisance at common law.[60]

Apart from these polar cases of physical occupation and noxious use, the distinction between a "taking" and a "regulation" has been made on a case-by-case basis,[61] with the Supreme Court viewing several variables as relevant. Among them, diminution in the value of property, destruction of investment-backed expectations, and reciprocity of benefits figure prominently in Supreme Court precedents. The more substantial the reduction of the value of the private property, the more likely it is that a "taking" will be found.[62] Similarly, the more severe the interference with expectations of a reasonable return on private investment, the more vulnerable a state regulation will be to invalidation for uncompensated losses.[63] In contrast, when a state regulatory scheme provides a "reciprocity of advantage" by creating parallel benefits and burdens for all interested parties (for example, in enhancing land value for an alternative activity at the same time that it diminishes land value for the prohibited activity),[64] it is less likely to work a compensable "taking."

Despite the judiciary's essentially ad hoc, factual inquiries in distinguishing "takings" and "regulations," it is possible to articulate generally the circumstances (apart from the requirements for "public use" and "means-ends fit" to be discussed below) in which a state regulatory scheme may impose uncompensated losses without creating a "taking." The state regulation (1) should not impose a permanent and physical occupation of private property; (2) should not destroy any traditionally recognized attribute of the property rights; (3) should not substantially diminish the commercial value of the property; (4) should not substantially frustrate expectations of a reasonable rate of return on investment; and (5) if at all possible, should secure some reciprocity of advantage for the burdened parties.

The second issue in takings clause challenges—whether the state has established a "public use" for the private property—is clearly the least problematic in case doctrine, if only because the Supreme Court has virtually abdicated any serious review of state regulation under this requirement. As early as 1905, the Supreme Court intimated that any use conducive to the public benefit was a "public use" justifying eminent domain, whether or not property was actually devoted to use by the public.[65] With the erosion of the distinction between public and private purposes under the takings clause, the "just compensation" requirement has become the surrogate for an independent inquiry into the public purpose of a "taking" of private property.[66] In its most recent articulation of the "public use" requirement for eminent domain, the Supreme Court acknowledged that the concept of "public use" is essentially "coterminous with the scope of a sovereign's police powers."[67]

In contrast, the third issue—whether the state can demonstrate an adequate "means-ends fit" (i.e., whether the statutory scheme is sufficiently related to the alleged public purposes)—lately has been resurrected as a potential obstacle to uncompensated land-use regulations, and may prove to be an independent requirement in the future for exercises of eminent domain even when just compensation is provided. A narrow majority of the Supreme Court recently required a showing that the particular land-use regulation chosen by the state would closely and substantially further the purposes or objectives for the regulatory scheme.[68] This "standard of precision," of course, far exceeds the burden of proof demanded of the state under the "public use" requirement in eminent domain or in review of state economic regulation under the due process clause.[69] Whether the justices will maintain their heightened scrutiny of the means-ends fit, of course, remains to be seen.

The fourth issue—whether the state has provided "just compensation" for a "taking"—has assumed greater importance since the Supreme Court dramatically changed the constitutional doctrine of "inverse condemnation"[70] in 1987. After years of uncertainty over the remedial rights of property owners who establish a regulatory "taking,"[71] the Supreme Court has declared that a government must compensate a property owner for whatever "temporary taking" occurs between enactment and invalidation of an offending regulation, at least when the owner is denied "all use" of the property during that period.[72] At this point, it is not clear how far-reaching the "temporary takings" doctrine will prove to be. For example, will the damages remedy be limited to temporary denial of *all effective* use? What *substantial time* must pass before a "temporary taking" is likely to be found?[73] To what damages will the property owner be entitled—consequential damages, loss of good will?[74] Ambiguities notwithstanding, it is evident that the "temporary takings" doctrine will be critical for state and local land-use regulators: once the doctrine is extended to zoning cases, government will presumptively be liable for interim damages should land-use restrictions later be deemed compensable "takings."[75] Moreover, the doctrine is likely to increase economic incentives for challenges to administrative rulings that inhibit land development.[76]

Cloudy and uncertain as the takings clause doctrine rightly appears, several of its elements have been revitalized. At the very least, this indicates the potential for a more stringent protection of private property rights under the federal Constitution that constrains a state's economic regulatory powers under its constitutional and statutory law. Such a signal is paralleled, as well, in the Fourteenth Amendment equal protection doctrine.

Economic Due Process and Equal Protection Doctrines

Fourteenth Amendment constraints on state economic regulation also exist under the due process and equal protection clauses.[77] Although earlier in this century the Supreme Court regularly invalidated economic measures under these clauses,[78] the Court's decisions since the late 1930s have demonstrated a virtual "hands-off" approach in substantive review of state economic regulation.[79] Generally, the Court has enforced a rule of "mere rationality": a state or local regulation affecting private economic and social interests will not be stricken if there is any "rational relationship" between the regulatory scheme and a legitimate legislative objective, even a "conceivable" purpose that might have motivated the regulating body.[80]

In a striking departure from rationality review, the Supreme Court lately has examined much more carefully the legitimacy of state regulations that discriminate against the economic interests of out-of-state enterprises.[81] A discriminatory measure enacted only for the purpose of promoting domestic business at the expense of out-of-state trade might not survive the Court's heightened standard of review.[82] This development is remarkable for at least two reasons. First, if it leads to an increased judicial solicitude for private economic interests,[83] the Court would be abandoning its post-1930s deference to political decisionmaking in areas of socioeconomic policy. Second, unlike its rulings under the dormant commerce clause, judicial enforcement of the equal protection clause would be binding on the Congress as well, restricting its authority under the commerce clause to permit parochial favoritism in state economic regulation.[84] However uncertain the future of equal protection restraints on discriminatory economic legislation,[85] it is apparent that a state regulation that disfavors out-of-state commercial ventures is vulnerable to attack, even with the approval of Congress, if it only furthers a "naked preference" for domestic industry.[86]

Authority for State Judicial Declaration of State Constitutional Law

Adequate and Independent State Grounds Doctrine

Unlike the constitutional provisions described above, which restrain all branches of state government in their exercise of police and economic regulatory powers under state constitutions, the doctrines to be examined in this section focus primarily on the federal constitutional authority of the federal judiciary. These doctrines restrain the federal judicial power[87] in the interest of full and effective declaration of state law by state courts. Essentially, these doctrines recognize and endorse independent state judicial development of state law, including state constitutional law.

Clearly, the independent and adequate state grounds doctrine is the most important among them. This doctrine prevents the U.S. Supreme Court from reviewing a state high court judgment that ultimately rests on a determination of state law, even though the state court may have erroneously decided an issue of federal law.[88] When resolution of the state ground does not rely conceptually and doctrinally on the federal law ruling (i.e., "independence" of state ground), and when the state court's judgment would stand even after Supreme Court reversal of its federal law holding (i.e., "adequacy" of state ground), the judgment is immunized totally from appellate review by the Supreme Court.[89]

At least two objectives justify the Court's self-imposed restraints on appellate jurisdiction under this doctrine. First, the Supreme Court should avoid unnecessary pronouncements on federal constitutional and statutory law, particularly if friction with state substantive policies or state judicial procedural rules might be avoided. Accordingly, the doctrine ensures the necessity for, and the efficacy of, a federal court ruling on appeal that actually resolves a case or controversy.[90] Second, the Supreme Court should manifest its respect for the state judiciary's role in developing and applying state law, constitutional and nonconstitutional, substantive and procedural. Thus, the doctrine is a gauge of the strength of "Our Federalism."

The Supreme Court has invoked the doctrine in both procedural and substantive contexts. In the procedural context, a state high court typically refuses to decide a federal law issue because the federal rights claimant has failed to comply with a requirement of state court procedure. In such a case, it is clear that the state procedural ground is "independent" of federal law, and the Supreme Court's inquiry addresses the "adequacy" of the procedural rationale to bar consideration of the federal law claim.[91] In the substantive context, however, a state high court judgment may appear to rely on both federal and state substantive law, and the Supreme Court's inquiry primarily explores the "independence" of the state law ground:[92] did the state court understand state law as the basis for its judgment, or did it refer to state law merely as additional support and illustration of a decision controlled by federal law? Discussion will focus on the substantive applications of the doctrine, for it is in this context that the doctrine has evolved into a viable and powerful instrument of "Our Federalism."

For illustration, compare Case 1 and Case 2 in the following example:

Case 1: A state high court holds that a state statute violates both state and federal constitutional guarantees. In its consideration of the state law ground, the court finds that the state constitutional standards violated by the statute are different from those under the federal Constitution.[93]

Case 2: A state high court holds that a state statute violates both state and federal constitutional guarantees. The court reasons that the state and federal provi-

> sions impose identical substantive restraints, and because the state statute violates the federal constitutional standards, it is also invalid under the state constitution.[94]

The issue of the "independence" of a state law decision generally arises because the state court's opinion has not clarified whether a state law guarantee has a substantive content which is separate and distinct from its counterpart under federal law. It is more likely that the Supreme Court would find such independence in Case 1 than in Case 2: in the latter, the state constitutional law decision appears inextricably enmeshed with, and reliant on, the ruling under federal law. Accordingly, the judgment in Case 1 is more likely to be immunized from Supreme Court review than the judgment in Case 2.

In 1983, the Supreme Court refashioned the independent and adequate state grounds doctrine by establishing a standard for review of federal law decisions rendered by state courts.[95] The Court will presume that it has appellate jurisdiction over any state high court decision

> when . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion.[96]

This presumption can be overcome, however, even if a state court chooses to refer to federal law decisions as persuasive (albeit not authoritative) precedents for its state law ruling:

> [The state court] need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.[97]

The Court's new standard for resolving the "independence" of state law grounds does balance competing federalism concerns. On the one hand, the approach permits the Supreme Court to maintain the supremacy and uniformity of federal law where a state court decision of a federal claim is both erroneous and determinative of the result in a case; additionally, it informs the state political branches that a potentially erroneous but unreviewable state judicial determination of a federal law issue need not be accorded binding force.[98] On the other hand, the approach assures the state judiciary of a firm basis for developing of state constitutional law, by immunizing from review state court decisions based on "bona fide separate, adequate, and independent grounds."[99]

Given the Court's standard of presumptive review, the burden of demonstrating that a state court judgment "plainly" rests on a state law ruling must be carried by rights claimants in their pleadings, briefing, and argumentation, and by state judges in their legal analysis and opinion writing. How, then, should a claimant's brief or a state judge's opinion be written, what analysis should it provide, to ensure insulation of the state court decision from Supreme Court review?

To date, the Court has not proposed or endorsed a set formula guaranteeing nonreviewability,[100] and it would be injudicious, if not misleading, to do so here. Nonetheless, it is possible to suggest a panoply of "analytic devices" which, if used in combination, will more likely than not establish an independent state law ground:[101]

1) A prefatory discussion of the role of state law in the opinion: in light of the rule that federal constitutional issues should be avoided if the case can be decided on alternative grounds, the claim of right shall be determined first under the state constitution; should the state constitution provide independent support for the claim, there is no need to reach the federal constitutional issues;
2) Explicit acknowledgement of a trend of greater protection for the relevant civil liberty under the state constitutional guarantee than its federal counterpart;
3) Citation to state constitutional law precedents alone or primarily to establish governing rules and standards;
4) Where federal court precedents are cited, explicit assurance that references to federal law serve only to guide independent analysis of state constitutional law guarantees;
5) Clarification that controlling state law precedents themselves rest on state law grounds.

The independent development of state constitutional law may demand analytical ingenuity and creativity, careful attention to writing style, and just "plain hard work."[102] This is the price to be paid for the autonomy of the state constitutional enterprise.

Abstention and Equitable Restraint Doctrines

Whereas the Supreme Court fashioned the independent and adequate state grounds doctrine to limit its own appellate jurisdiction over state high court decisions, the Court has developed a number of rules to restrict the original jurisdiction of the federal district courts, which also operate in favor of state court declaration of state constitutional and statutory law. Known as the abstention and equitable restraint doctrines, these rules generally apply when a federal district court is asked to grant injunctive or declaratory relief to prevent alleged violations of federal constitutional rights by state executive, administrative or judicial officials in their enforcement of state law.[103] In federal court actions against state and local governments, familiarity of governmental counsel with these rules will maximize the opportunities for state court adjudication of state constitutional law issues.

Pullman Abstention Doctrine. Where adjudication of an unclear and unsettled question of state law would dispose of a substantial and sensitive federal constitutional question, a federal district court must temporarily abstain from exercising jurisdiction in order to give the state courts an opportunity to decide the state law issue.

The rule of Pullman abstention[104] recognizes that federal courts should exercise their equitable powers so as to avoid the "waste" of an unnecessary and tentative decision on federal constitutional grounds,[105] and to accord due respect for state adjudication of ambiguous state law issues.[106] Abstention is conditioned, however, on real uncertainty in the interpretation of a state law; generally, the federal court will not be confident that a bona fide dispute over the meaning or purpose of the state law can be resolved by construing the text or by relying on definitive state court precedents. Even significant ambiguity will not trigger abstention, however, unless clarification of the state law may avoid the need for further consideration of the federal constitutional issue. Notably, the Supreme Court has not yet required abstention in the face of a potential state constitutional challenge, although invalidation of the state law on this basis would clearly moot the federal constitutional question.[107]

Abstention in Diversity Actions. A federal district court may abstain from exercising diversity jurisdiction to adjudicate an unclear and unsettled issue of state law where there is the potential for federal interference with the operation of state law in a sensitive area of state policy.

The Supreme Court has extended the abstention doctrine to federal diversity actions challenging state policies in significant public regulatory fields, such as eminent domain proceedings[108] and management of essential state industries.[109] In these instances, abstention often prevents federal intermeddling in the operation of complex and technical administrative schemes involving difficult questions of state law.[110] Federal district courts are not required to relinquish diversity jurisdiction, however, merely because policies important to the domestic interests of a state are challenged.[111]

Equitable Restraint Doctrine. A federal district court must refrain from exercising jurisdiction in an equitable action for declaratory judgment or injunctive relief challenging the federal constitutionality of a state law or an official act which is the subject of a pending judicial or administrative proceeding brought by the state against the federal plaintiff.

The Supreme Court's current solicitude for "Our Federalism" first congealed in the crucible of the equitable restraint doctrine.[112] The intricate web of rules subsumed under this doctrine[113] may promote "comity" between federal and state courts in several ways. By refusing to intervene in state adjudications in order to explore a federal constitutional question, federal district courts do not disrupt the normal processes of the state judiciary, and do not foreclose their opportunities for independent development and enforcement of state substantive law,[114] including state constitutional law. Furthermore, the federal district courts demonstrate confidence in the competence and good faith of the state judiciary to enforce the guarantees of the federal Constitution.[115] Whether the equitable restraint doctrine effectively attains its purposes,[116] it symbolizes the dedication of contemporary federal constitutional law, in a number of areas, to the maintenance of "Our Federalism."

Conclusion

This overview of eight federal constitutional doctrines only sketches the outlines of the greater federalist design. At the same time that it restricts state action, American federalism recognizes broad state powers to order public rights and private liberties in economic ventures and political and civil activities. In the efforts of state government to strike a balance among competing public policy objectives, state constitutional law has a central role to play. The potential for state constitutional involvement must be understood and the extent of its authority enforced.

Understanding this potential is not, however, an effortless or risk-free task. As the prior discussion should illustrate, successful navigation of federal constitutional restraints requires careful study of the rocks and shoals on which the independent development of state constitutional law might founder. Reliance on any broad-brushed or abstract concept of inherent state sovereignty is unlikely to immunize state action from federal limitations. Only a precise identification of the federal constitutional doctrines implicated by state regulations or judicial rulings, and a detailed analysis of the parameters within which state policymaking may safely operate, will ensure the viability of the state constitutional law enterprise.

The warning of Justice Robert Jackson, written for an analysis of "inherent" presidential powers, takes on a different and special meaning in the context of the evolution of state constitutional law: "But I have no illusion that any decision by this Court can keep power in the hands of [state government] if it is not wise and timely in meeting its problems. . . .If not good law, there was worldly wisdom in the maxim attributed to Napoleon that 'The tools belong to the man who can use them.' "[117] The federal judiciary has created opportunities for state foresight and assumption of responsibility. While nascent, the current movement to integrate state constitutions into the processes of state lawmaking signifies that the promises of "Our Federalism" might be realized.

NOTES

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[1] Younger v. Harris, 401 U.S. 37, 44-45 (1971).

[2] In federal constitutional history, the year 1937 is generally regarded as the birthdate of a radical shift in federal judicial thought, which ratified the expansion of federal administrative authority over economic and police power affairs that formerly had fallen within the domain of state law. This movement in constitutional jurisprudence originated with the Supreme Court's sanction of broad Congressional powers under the commerce clause. See, e.g., National Labor Relations Board v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1937). For accounts of the post-1937 "revolution" in federal constitutional doctrine and theory, see Grant Gilmore, *The Ages of American Law* (New Haven: Yale University Press, 1977); Laurence Tribe, *American Constitutional Law* (Mineola, New York: Foundation Press, 1988), pp. 297-316, 378-397; David Skover, " 'Phoenix Rising' and Federalism Analysis," *Hastings Constitutional Law Quarterly* 13 (1986): 271, 281-284.

[3] See Ronald Collins and David Skover, "The Future of Liberal Legal Scholarship: A Commentary," *Michigan Law Review* 87 (October 1989): 1899-239.

[4] For example, the Burger Court created a "public safety" exception to the Fourth Amendment rules against involuntary confessions in New York v. Quarles, 104 S.Ct. 2626 (1984), and a "good faith" exception to the exclusionary rule in United States v. Leon, 104 S.Ct. 3405 (1984). Moreover, after many years in which federal habeas corpus had encompassed claims under the exclusionary rule, the Burger Court held in Stone v. Powell, 428 U.S. 465 (1976), that it would not be available to review search and seizure decisions reached after full consideration in state courts. Excellent analyses of the curtailing of constitutional rights for criminal defendants recognized by the Warren Court are provided in Leonard Levy, *Against the Law: The Nixon Court and Criminal Justice* (New York: Harper and Row, 1974); Yale Kamisar, *Police Interrogations and Confessions* (Ann Arbor: University of Michigan Press, 1980).

[5] The right of privacy in sexual relations, recognized for married couples in Griswold v. Connecticut, 381 U.S. 479 (1965), and for unmarried heterosexuals in Eisenstadt v. Baird, 405 U.S. 438 (1972), was not extended by the Rehnquist Court in Bowers v. Hardwick, 478 U.S. 186 (1986) to consenting adult homosexual activity in the privacy of the home. Some scholars consider Bowers to signal the demise of the current doctrine of privacy. See e.g., Daniel O. Conkle, "The Second Death of Substantive Due Process," *Indiana Law Journal* 62 (1987): 1585-94.

[6] In its notorious "shopping center" cases, the Burger Court compromised the force of the "public function" rationale for the state action doctrine, which had been used by the Warren Court to protect political speech activities. See Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Hudgens v. National Labor Railroad Board, 424 U.S. 507 (1976). Of course, this development set the stage for independent state protection of free speech under state constitutions. See chapter 4. In addition, the Rehnquist Court seriously undermined the potential for finding state action in a "symbiotic" economic relationship between the state and a private party in San Francisco Arts and Athletics Inc. v. United States Olympic Committee, 107 S.Ct. 2971 (1987). For an analysis of the potential under state constitutional law for rejecting the Fourteenth Amendment state action doctrine, see David Skover, "The Washington Constitutional 'State Action' Doctrine: A Fundamental Right to State Action," *University of Puget Sound Law Review* 8 (1985): 221-82.

[7] The Burger Court has not materially broadened the categories of "suspect classes" or "fundamental rights," which are especially protected under the equal protection clause, beyond those established by the Warren Court. In addition, the Court imposed a substantial burden on civil rights plaintiffs by requiring proof of intentional discrimination before an equal protection discrimination claim will be upheld. Washington v. Davis, 426 U.S. 229 (1976). Recently, the Rehnquist Court extended this requirement to hold that a challenge of racial discrimination in a petit jury must be based on proof that the jury members acted with discriminatory purpose in the criminal defendant's own trial. McCleskey v. Kemp, 107 S.Ct. 1756 (1987).

[8] Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980). Further discussion of the Pruneyard decision and its import for the evolution of free speech doctrine under state constitutions is found in chapter 4.

[9] Garcia v. San Antonio Metropolitan Transit Authority, 105 S.Ct. 1005 (1985) (no independent Tenth Amendment limitation on Congress' commerce powers), overruling National League of Cities v. Usery, 426 U.S. 833 (1965).

[10] The Garcia decision stressed that judicial limitation of Congress' commerce powers in the interest of the states could be justified only by possible breakdowns in the structural or procedural restraints that protect the states within the national political processes. 105 S.Ct. at 1019-20. This emphasis on judicial review of the national political process invites the adoption of standards to ensure adequate consideration and weighing of state interests implicated in federal interstate commerce regulation. These standards might require a "clear statement" in legislative history that conscious and deliberate attention was given to state interests in striking the balance in favor of federal commerce regulation. In fact, the Court has already hinted at the viability of such standards for judicial review of federal commerce clause legislation in United States v. Bass, 404 U.S. 336 (1971), and has imposed a stringent "clear statement" rule in challenges to commerce clause legislation under the Eleventh Amendment. See, e.g., Atascadero State Hospital v. Scanlon, 105 S.Ct. 3142, 3149-50 (1985). For discussion of judicial review of the national political process under the commerce clause, see Skover, " 'Phoenix Rising' and Federalism Analysis."

[11] See, e.g., Valley Forge Christian College v. Americans United, 454 U.S. 464 (1982)(federal taxpayer standing); Allen v. Wright, 104 S.Ct. 3315 (1984)(minority class standing).

[12] For analysis and critique of recent developments in the Eleventh Amendment sovereign immunity doctrine, see, e.g., Akhil R. Amar, "Of Sovereignty and Federalism," *Yale Law Journal* 96 (1987): 1425, and Skover, " 'Phoenix Rising' and Federalism Analysis," pp. 298-303.

[13] See generally Ronald Collins and Peter Galie, "Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions," *Publius: The Journal of Federalism* 16 (Summer 1986): 111-140; Collins and Galie, "State Constitutional Cases and Commentaries," *National Law Journal* (Sept. 29, 1986): p. S 9, col. 2; Collins, Galie, and John Kincaid, "State High Courts, State Constitutions, and Individual Rights Litigation since 1980: A Judicial Survey," *Publius: The Journal of Federalism* 16 (Summer 1986): 141-163.

[14] See Collins and Skover, "The Future of Liberal Legal Scholarship," Parts IV-A and IV-B.

[15] This chapter's analysis of federal constitutional doctrines often draws on the rulings in U.S. Supreme Court cases decided in the second half of the 20th century. Such a reliance neither implies that the federal Constitution means only what the Supreme Court interprets it to provide nor suggests that the political branches of the federal government play no role in defining the scope of state power under the Constitution. Indeed, it is important not to equate federal constitutional thought exclusively with courts, or to neglect the impact of congressional and executive action on the constitutional process. See Collins and Skover, "The Future of Liberal Legal Scholarship" (stressing the need for legislative scholarship); William N. Eskridge and Phillip P. Frickey, "Legislation Scholarship and Pedagogy in the Post-Legal Process Era," *University of Pittsburgh Law Review* 48 (1987): 691-731, 691, 693, 709-10, 716-19, 724-25); Ronald Collins and David Skover, "The Senator and the Constitution: An Interview with Orrin G. Hatch" (interview and annotations presenting a constitutional "profile" of Senator Hatch). Rather, this chapter's focus on jurisprudence is a function of necessity. Two of the federal constitutional provisions discussed in the first section of the chapter—the supremacy and commerce clauses—restrain a state's lawmaking under its own constitution primarily by force of Supreme Court interpretations that either presume an absence of congressional action—in the case of the dormant commerce clause doctrine—or take congressional action as a fait accompli—as in the preemption doctrine. The remainder of the first section treats those federal guarantees of individual property rights—the takings clause and the due process and equal protection clauses—that have been revitalized by recent Supreme Court interpretations to place potentially severe constraints on a state's economic regulatory powers under its constitutional and statutory law. Finally, all of the doctrines described in the second section of the chapter concern the constitutional power of the federal courts vis-a-vis state judicial and political governmental actors, and derive from Supreme Court constructions of Article III of the U.S. Constitution and of congressional grants of jurisdiction.

[16] This chapter presents only a partial vision of the restraints under the U.S. Constitution on state lawmaking, including state constitutional law development. Among individual rights and federalism doctrines that are not treated here—the specific limitations on state power in Art. I, 10 (particularly the commerce clause doctrine), the requirements of the privileges and immunities clause of Art. IV, 2, the restrictions on state taxation of interstate commerce, the breadth of congressional spending power for the "general welfare," the incorporation of the Bill of Rights through the Fourteenth Amendment due process clause, the Fourteenth Amendment equal protection clause, and the Art. III limits on federal court power (particularly the standing and political question doctrines)—all constrain state authority, to a greater or lesser degree, to regulate economic and sociopolitical interests under state constitutional and nonconstitutional law. Of course, even a cursory study of the full body of these doctrines is beyond the scope of this chapter. Three criteria distinguish the doctrines selected for review here. First, traditional federal constitutional constructs for examination of federalism issues have been fashioned through these doctrines, particularly the preemption and dormant commerce clause doctrines. Second, several of these doctrines have been especially important in the evolution of the state constitutional law movement, including preemption, independent and adequate state law grounds, abstention and equitable restraint doctrines. Third, recent Supreme Court developments in several of these doctrines, including the dormant commerce clause, takings clause and economic equal protection doctrines, have taken unanticipated turns, which may affect significantly the exercise of traditional state police powers, primarily with respect to business and land use regulation.

[17] Article VI, cl. 2 of the U.S. Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[18] See, e.g., Jones v. Rath Packing Co., 430 U.S. 519, 536-37 (1977) (state labelling regulation held expressly preempted by congressional prohibition of any labeling and packaging requirements in addition to those under federal statutes).

[19] See, e.g., City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973) (city ordinance regulating aircraft noise conflicted with purposes of *Federal Aeronautics Act* to insure the efficient utilization of airspace); Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge, 403 U.S. 274, 296 (1971)(pervasiveness of federal regulation of labor relations precludes state wrongful discharge actions requiring interpretation of labor contract's union security clause). The existence of a federal agency with broad regulatory powers in a particular subject area is relevant to the issue of Congressional intent to preempt a field. See, e.g., Teamsters Local 20 v. Morton, 377 U.S. 252 (1964)(state restrictions on striking activities preempted by national labor regulations). But a federal agency's existence is not dispositive of the issue of federal occupation, particularly when state regulation of an aspect of interstate commerce may concern itself with "local" matters. See, e.g., Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. 190 (1983) (California statute aimed at the economic problems of storing and disposing of nuclear waste is not preempted by extensive federal regulation of the nuclear power industry through the Nuclear Regulatory Commission).

[20] Subject areas committed to congressional regulation under U.S. Constitution, Art. I, 8, such as bankruptcy, patent and trademark, admiralty, and immigration, have been found regulatory fields of dominant federal interest in which state activity may be barred. See, e.g., Hines v. Davidowitz, 312 U.S. 52 (1941) (Pennsylvania's Alien Registration Act preempted by federal *Alien Registration Act* because regulation of aliens and foreign affairs is of primary national concern); Ramah Navajo School Board, Inc. v. Bureau of Revenue, 458 U.S. 832 (regulation of Indian educational institutions falls within an area of peculiarly federal interest).

[21] See, e.g., McDermott v. Wisconsin, 228 U.S. 115 (1913)(proper labelling of syrup for retail sale under *Federal Food and Drugs Act* regulations would have violated state statutory requirements for labeling); Southland Corp. v. Keating, 465 U.S. 1 (1984) (California statute nullifying arbitration clauses in contracts in direct conflict with *Federal Arbitration Act*).

[22] See, e.g., Nash v. Florida Industrial Commission 389 U.S. 235 (1967) (invalidated state unemployment compensation law as applied to deny benefits to applicants because they had filed an unfair labor practice charge with the N.L.R.B.); City of Burbank v. Lockheed Air Terminal, Inc. It is possible that judicial enforcement of the full policy objectives underlying a congressional regulatory scheme will have the unanticipated impact of discouraging state constitutional designs that delegate economic and police powers to local governmental units. An interesting example of this phenomenon is found in Community Communications Co., Inc. v. City of Boulder, 455 U.S. 40 (1981), in which the television cable broadcasting regulations of a "home rule" municipality, granted extensive powers of self-government by its state constitution, were held to be subject to the restraints of federal antitrust legislation, as the municipality's economic controls did not enjoy immunity under the "state action" exemption.

[23] For a description of theoretical stages in the Supreme Court's development of federalism doctrine, as viewed in the context of Congress' interstate commerce powers, see Skover, "'Phoenix Rising' and Federalism Analysis," pp. 273-91. See also Tribe, *American Constitutional Law*; Scheiber, "Federalism (History)" and Elazar, "Federalism (Theory)," in Leonard W. Levy, Kenneth L. Karst, and Dennis J. Mahoney, eds., *Encyclopedia of the American Constitution*, Vol. 2 (New York: Macmillan Publishing Co., 1986), pp. 697-708 (hereinafter *Encyclopedia*).

[24] Two eras of constitutional federalism—the pre-1930s and the period from 1940 to 1973—were characterized by Supreme Court solicitude for national interests under the preemption doctrine, but for different theoretical reasons. Prior to the 1930s, the Supreme Court's "dual sovereignty" perspective, which rigidly differentiated federal and state spheres of power, was fortified by a presumption of federal preemption in any field that the federal government might constitutionally regulate and did in fact regulate. In contrast, during the Warren Court years, an expansive preemptive scope in any federal scheme that regulated a substantial industry solidified the jurisdiction of nascent federal administrative agencies, and secured the primacy of federal control in areas of traditional state economic and police regulation, including labor law, civil rights, welfare entitlements, and criminal law. For an excellent analysis of changes in the Supreme Court's preemption doctrines in tandem with the Court's evolving concepts of constitutional federalism, see Note, "The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court," *Columbia Law Review* 75 (1975): 623 (surveying common directions in preemption decisions from the early 1900s to 1974).

[25] The term "cooperative federalism" refers to the notion that national socioeconomic policy is the joint product of federal and state governmental regulation. The main features of cooperative federalism—overlapping of federal and state spheres of economic and police powers, sharing of political responsibilities and financial resources, and interdependence of administration—are associated typically with federal grant-in-aid programs. See Edward S. Corwin, *Constitutional Revolution, Ltd.* (Claremont, California: Pomona College, Scripps College, Claremont College, 1941); Scheiber, "Cooperative Federalism," in 2 *Encyclopedia*, p. 503.

[26] The federal judiciary's contemporary approach in preemption—marked by a protective attitude toward state economic and police regulatory power—was ushered in by four Supreme Court decisions in 1973 and 1974: Goldstein v. California, 412 U.S. 546 (1973)(state prohibition of reproduction of misappropriated phonograph records upheld under narrow construction of Art. I, 8 copyright clause); New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973)(New York requirement that recipients of federal AFDC benefits accept employment not preempted by federal welfare regulations); Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974)(federal patent law does not preempt state trade secret law); Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Ware, 414 U.S. 117 (1973)(state statutory directive prohibiting judicial enforcement of arbitration clauses in employee suits for collection of wages not preempted by a Securities Exchange rule of arbitration of any controversy arising from employment termination). The Burger Court's early change of direction in the presumptions underlying the Preemption Doctrine is discussed in Note, "The Preemption Doctrine," 639-51.

[27] In the Supreme Court's most recent preemption decision to date, the Justices unanimously articulated this presumption as follows:

> As we have repeatedly stated, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corporation, 56 U.S.L.W. 4307, 4308 (1988), quoting Hillsborough County v. Automated Medical Laboratories, Inc. 471 U.S. 707, 715 (1985), quoting Jones v. Rath Packing Co., 525.

The state-protective presumption for the constitutional preemption doctrine has been reinforced by recent guidelines for federal executive interpretation of legislative policies that have federalism implications. President Ronald Reagan's Executive Order on Federalism requires executive departments and agencies to construe a federal statute to preempt state law only when the statute contains an express preemption provision, when there is compelling evidence of congressional preemptive intent, or when the exercise of state authority directly conflicts with the exercise of federal authority under the federal statute. See Executive Order 12612, *Federal Register*, Vol. 52, No. 210, pp. 41685-688 (October 30, 1987).

[28] See, e.g., C.T.S. Corp. v. Dynamics Corp. of America, 107 S.Ct. 1637 (1987)(Indiana statute regulating takeovers not preempted by *Williams Act* that governs hostile

corporate stock tender offers); Wardair Canada, Inc. v. Florida Department of Revenue, 106 S.Ct. 2369, 2372 (1986)(state sales taxation of airline fuel not preempted despite the fact that "agencies charged by Congress with regulatory responsibility over foreign air travel exercise power . . . over licensing, route services, rates and fares, tariffs, safety, and other aspects of air travel"). If Congress terminates or substantially reduces regulation of a field, the federal judiciary is not likely to require an express intent to retransfer regulatory authority to the states before finding that Congress has abandoned the field. See Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp., 4308 (congressional purpose to mandate a freemarket regime in the field of petroleum allocation and pricing and to preempt all state regulation of the field cannot be implied merely from the expiration of a former and comprehensive federal regulatory scheme).

[29] For example, in C.T.S. Corp., the Court noted that the *Williams Act* would preempt a variety of state corporation laws authorizing staggered boards of directors and cumulative voting, if it were construed to invalidate any state statute that may limit or delay the free exercise of power after a successful tender offer. The Court responded:

> The long-standing prevalence of state regulation in this area suggests that, if Congress had intended to preempt all state laws that delay the acquisition of voting control following a tender offer, it would have said so explicitly.

[30] See, e.g., Schneidewind v. ANR Pipeline Co., 56 U.S.L.W. 4249 (1988) (Michigan statute controlling the approval of securities issues by public utilities which distributed natural gas in the state preempted by the *Natural Gas Act*). The Court determined that the Michigan statute was designed to protect investors and ratepayers by ensuring "efficient and uninterrupted service at reasonable rates." The state's attempt to direct rate setting fell within the aegis of the *Natural Gas Act* (NGA), which had conferred on the Federal Energy Regulatory Commission (FERC) exclusive jurisdiction over the rates and facilities of natural gas companies that engaged in the wholesaling of natural gas in interstate commerce. Although NGA had not expressly authorized FERC to regulate the issuance of securities by natural gas companies, the state's pre-issuance review of securities amounted to a regulation in the field of gas wholesales that Congress "had occupied to the exclusion of state law" by "a comprehensive scheme of federal regulation." The Court concluded:

> In short, the things [the Michigan statute] is directed at . . . are precisely the things over which FERC has comprehensive authority. Of course, every state statute that has some indirect effect on rates and facilities of natural gas companies is not preempted. [The Michigan statute's] effect, however, is not "indirect." In this case we are presented with a state law whose central purpose is to regulate matters that Congress intended FERC to regulate. Not only is such regulation the function of the federal regulatory scheme, but the NGA has equipped FERC adequately to address the precise concerns [the Michigan statute] purports to manage.

[31] See, e.g., C.T.S. Corp., 1647 (no actual conflict requiring preemption of Indiana takeover regulation, since it is entirely possible for entities to comply with both the Indiana statute and the *Williams Act*; the Indiana statute provides for vesting of voting rights 50 days after commencement of an offer, within the 60-day maximum period Congress established for tender offers); Florida Lime and Avocado Growers v. Paul, 373 U.S. 132, 143 (1963) (California law which regulated the marketing of avocados sold in the state did not actually conflict with federal regulations of Florida avocado production, because joint compliance was not impossible if Florida growers allowed the fruit to mature beyond the earliest picking date permitted by federal regulations).

[32] See, e.g., Schneidewind, 4254 (preemption of Michigan natural gas rate regulation supported by the "imminent possibility of collision" between the state and federal laws, without a demonstration that the impossibility of dual compliance would be an "inevitable consequence").

[33] In the absence of a finding that Congress has occupied the regulatory field, a state law which either serves identical or similar objectives as federal law, or furthers a traditional state purpose which is distinct, yet consonant with federal objectives, is likely to be sustained as "supplementary" state action. See, e.g., C.T.S. Corp., 1645-46 (Indiana's protection of shareholders from coercive takeover offers furthers the federal policy of investor protection in the *Williams Act*); Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) (traditional tort remedies, including compensatory and punitive damages, may be awarded to victims of radiation injuries from nuclear power plants without frustrating the federal purposes to occupy the entire field of nuclear safety concerns under the *Atomic Energy Act*; whatever compensation standard the state might impose, the nuclear licensee remains free to operate under the federal standards for construction and safety and to pay for any injury that results).

[34] Article I, 8, cl. 3 of the U.S. Constitution provides:

> [The Congress shall have Power] to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

[35] This analysis of dormant commerce clause doctrine does not examine the case law particular either to discriminatory and cumulatively burdensome state taxing schemes or to intergovernmental tax immunities. For useful discussions of these areas, see Paul J. Hartman, *Federal Limitations on State and Local Taxation* (Rochester, New York:, Lawyers Co-operative Publishing Co., 1981) 2:1-2:20, 6:1-6:28; Jerome R. Hellerstein, *State Taxation: Corporate Income and Franchise Tax* RT. 1 (New York: Warren Gokham and Lamont 1983), Vol. I 4.1-4.16.

[36] For theoretical analyses of the designs and objectives of the dormant commerce clause doctrine, see, e.g., Earl Maltz, "How Much Regulation Is Too Much—An Examination of Commerce Clause Jurisprudence," *George Washington Law Review* 50 (1981): 47 ("free location principle" in dormant commerce clause); Henry P. Monaghan, "Foreword: Constitutional Common Law," *Harvard Law Review* 89 (1975): 1, (constitutional common law doctrine based on national free trade philosophy); Donald H. Regan, "The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause," *Michigan Law Review* 84 (1986): 1091 (primary purpose is prevention of purposeful economic protectionism); Mark V. Tushnet, "Rethinking the Dormant Commerce Clause," *Wisconsin Law Review* (1979): 125 (economic "efficiency" concerns).

[37] The classic statement of the purposes and functions of the Dormant Commerce Clause Doctrine was articulated by Justice Robert Jackson in H. P. Hood and Sons, Inc. v. Du Mond, 336 U.S. 525, 534-39 (1949):

> While the Constitution vests in Congress the power to regulate commerce among the states, it does not say what the state may or may not do in the absence of congressional action. [This] Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution. . . .[The] principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. . . . Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by custom duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

[38] Concurring in Duckworth v. Arkansas, 314 U.S. 390, 400 (1941), Justice Robert Jackson explained that congressional inertia in eliminating state obstructions to interstate commerce justified judicial activism under the dormant commerce clause doctrine:

> [These] restraints are individually too petty, too diversified, and too local to get the attention of a Congress hard pressed with more urgent matters. [The] sluggishness of government, the multitude of matters that clamor for attention, and the relative ease with which men are persuaded to postpone troublesome decisions, all make inertia one of the most decisive powers in determining the course of our affairs and frequently give to the established order of things a longevity and vitality much beyond its merits.

In this regard, see also Ernest J. Brown, "The Open Economy: Mr. Justice Frankfurter and the Position of the Judiciary," *Yale Law Journal* 67 (1957): 219, 222 ("Nor has Congress been so idle that such matters could be assured a place on its agenda without competition from other business which might often be deemed more pressing"). Public choice theory may support the role of the judiciary in enforcement of the dormant commerce clause. If the benefits of economic parochialism are concentrated within a small, easily organized group of state industries, invalidation of state protectionist legislation allocates the burden of overcoming congressional inertia on the interest group that has the most economic incentive to seek favorable federal regulation. See, e.g., James Q. Wilson, *The Politics of Regulation* (New York: Basic Books, 1980), pp. 366-70 (need for a "watchdog" for the public interest in the case of "client politics"); Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge: Harvard University Press, 1965), pp. 1-3, 53-65, 125-31 (relatively small groups with concentrated economic interests are more frequently able to mobilize political power than relatively large, latent groups with dispersed economic interests).

[39] In one important sense, judicial enforcement of the dormant commerce clause doctrine against state economic regulation differs from constitutional decisions in other contexts, such as enforcement of the commerce clause against congressional legislation or enforcement of the contract and takings clauses against state legislation. It must be remembered that the restraints of the dormant commerce clause operate in the "silence" of Congress. Congress may always displace dormant commerce clause decisions by affirmatively regulating, either to preempt state regulation of interstate commerce or to authorize state interference with interstate commerce. See, e.g., Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946) (*McCarran-Ferguson Act*, reserving to the states the power to regulate insurance, allows for discriminatory taxes on premiums paid to out-of-state insurance firms).

[40] See, e.g., City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (invalidating a New Jersey law which prohibited the importation of solid or liquid waste collected outside the territorial limits of the state); Hughes v. Oklahoma, 441 U.S. 322 (1979) (invalidating an Oklahoma law that barred the export of minnows taken from state waters).

[41] See, e.g., Hunt v. Washington Apple Advertising Commission, 432 U.S. 333, 349-51 (1977) (invalidating a North Carolina statute that prohibited closed containers of apples shipped into or sold in the state to display any grade other than the applicable U.S. grade or standard). Despite the evenhanded treatment of local and out-of-state producers on the face of the statute, because North Carolina had no grading requirements at all, the regulation exclusively burdened out-of-state producers with strict grading requirements. The Court attached substantial weight to the fact that, by stripping Washington of the competitive advantages it had enjoyed through its rigorous inspection and grading system, the statute appeared to serve an intentionally discriminatory purpose.

[42] See, e.g., Maine v. Taylor, 106 S.Ct. 2440 (1986) (Maine's total ban on the importation of live bait fish, supported by bona fide concerns for the health and safety of the state's wild fish stock, sustained in the absence of reasonable nondiscriminatory alternatives to the discrimination against interstate commerce); Mintz v. Baldwin, 289 U.S. 346 (1933) (upheld New York law requiring all cattle imported into the state for dairy or breeding purposes to be inspected for Bang's disease).

[43] In other terms, the state must demonstrate that out-of-state entities are the peculiar source of an evil which the state may legitimately aim to control. Contrast City of Philadelphia (New Jersey's legitimate environmental goals could have been met by a nondiscriminatory regulation of the amounts of waste deposited in the state's private landfills, regardless of their state of origin) with Maine v. Taylor (parasites and sea animals that might upset the ecological balance of Maine's unique fisheries were not native to Maine waters, and there existed no satisfactory way to inspect baitfish shipments to screen the harmful conditions).

[44] A solid majority of the Supreme Court recently affirmed the exacting nature of its review of discriminatory state economic regulation under the commerce clause in Brown-Forman Distillers Corp. v. New York State Liquor Authority, 106 S.Ct. 2080, 2084 (1986):

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.

[45] See, e.g., Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) (invalidating Illinois' mudguard regulation as ap-

plied to interstate trucking industry, as the regulation varied from the uniform requirements of other states without any evident safety advantage and actually conflicted with the requirements of one state).

[46] See, e.g., Brown-Forman Distillers Corp. v. New York State Liquor Authority (invalidating New York price affirmation law, which required liquor distillers and producers selling liquor in New York to seek the permission of the liquor authority before lowering prices in other states, because it effectively gave the state agency the power to control prices beyond the state's borders); Edgar v. MITE Corp., 457 U.S. 624, 644 (1982) (invalidating Illinois' takeover statute that regulated tender offers for multistate corporations if 10 percent of shareholders were state residents; criticizing the statute's extraterritorial sweep, the majority held that a "state has no legitimate interest in protecting nonresident shareholders"); but, compare C.T.S. Corp. (sustaining Indiana's takeover statute regulating only the corporations that the state has chartered).

[47] The balancing approach in dormant commerce clause doctrine is associated with its most celebrated statement in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (invalidating Arizona law requiring fruit grown within the state to be packed locally). See also Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) (invalidating Arizona's restrictions on the lengths of railroad trains on the basis that whatever slight or marginal improvements to safety the regulation might accrue could not outweigh the great expense and delay that it imposed on railroad travel by deviating from nationally standard practices); Kassel v. Consolidated Freightways, 450 U.S. 662 (1981) (plurality opinion by J. Powell) (invalidating Iowa limits on the length of trucking "doubles" by balancing state's safety interest against the burden on interstate commerce).

[48] Among the most forceful opponents of balancing in dormant commerce clause cases is Justice Scalia, who argued in concurrence in C.T.S. Corp., 1652-53, that "such an inquiry is ill-suited to the judicial function. . . . I do not know what qualifies us to make . . . the ultimate (and most ineffable) judgment as to whether, given importance level x, and effectiveness level y, the worth of the statute is 'outweighed' by impact on commerce z." This argument largely echoes the position taken by then- Associate Justice Rehnquist against balancing state safety considerations against burdens on interstate commerce in transportation regulations. See, e.g., Kassel, 691-93 (Rehnquist, J., dissenting). Importantly, the majority opinion in C.T.S. did not examine the validity of the Indiana takeover statute under balancing analysis before affirming its constitutionality and, in fact, expressed a reluctance "to second-guess the empirical judgments of lawmakers concerning the utility of legislation," C.T.S, 1651, citing Kassel, 679 (Brennan, J., concurring). Although it may be implied that the Court is increasingly willing to dispense with the balancing approach in the dormant commerce clause doctrine, the rejection of this analysis remains to be seen.

[49] See Skover, " 'Phoenix Rising' and Federalism Analysis," pp. 295-98 (active judicial intervention in economic regulation under dormant commerce clause doctrine is theoretically and practically inconsistent with the Supreme Court's reliance on "political safeguards of federalism" in recent commerce clause doctrine); Julian N. Eule, "Laying the Dormant Commerce Clause to Rest," *Yale Law Journal* 91 (1982): 425 (evaluation of discriminatory economic measures under different constitutional provisions); Tushnet, "Rethinking the Dormant Commerce Clause" (focus of inquiry should be distortions in state political processes).

[50] See, e.g., Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) (sustaining a Maryland program designed to reduce the number of junked automobiles in the state by establishing a "bounty" on Maryland-licensed junk cars and imposing more stringent documentation requirements on out-of-state scrap processors than on in-state competitors); White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983) (upholding an order of the mayor of Boston that all construction projects funded by the city must be performed by a work force including one-half bona fide city residents).

[51] See, e.g., Reeves v. Stake, 447 U.S. 429 (1980) (upholding the policy of a state-owned cement plant to favor in-state customers in times of product shortage).

[52] See South-Central Timber Development v. Wunnicke, 467 U.S. 82 (1984) (invalidating contractual requirement of Alaska public corporation that timber sold by the state at preferential prices be processed within the state, for imposition of unconstitutional regulatory conditions downstream in the timber processing market).

[53] The takings clause of the Fifth Amendment to the U.S. Constitution, which restricts the eminent domain powers of the federal government, provides: "nor shall private property be taken for public use, without just compensation." Identical limitations on the eminent domain authority of state governments have been enforced through the Fourteenth Amendment due process clause.

[54] As will become apparent, the Supreme Court's current doctrine on the "public use" requirement understands that this objective—the securing of a public good—is likely to be served by the "just compensation" requirement: that is, public willingness to pay for a transfer of property suggests that some actual public gain underlies the taking.

[55] Among the most important studies of the history and normative purposes of the takings clause, see generally Bruce Ackerman, *Private Property and the Constitution* (New Haven: Yale University Press, 1977); Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge: Harvard University Press, 1985); Frank I. Michelman, "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law," *Harvard Law Review* 80 (1967): 1165; Joseph L. Sax, "Taking and the Police Power," *Yale Law Journal* 74 (1971): 36; Joseph L. Sax, "Takings, Private Property and Public Rights," *Yale Law Journal* 81 (1971): 149.

[56] The Supreme Court itself has acknowledged as much, in admitting a lack of determinate rules or standards in the takings clause doctrine. Consider Justice William Brennan's statement in the opinion of the Court in Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978):

> [T]his Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.

[57] See, e.g., Pumpelly v. Green Bay and Mississippi Canal Co., 80 U.S. 166 (1871) (destruction of private property by government-caused flooding).

[58] In Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), the Supreme Court recognized that

a "taking" generally will be found in the case of a governmentally authorized permanent physical occupation of private property. The Court's decision in Loretto invalidated a New York statute that required landlords to permit a cable television company to install cable facilities on rental land and buildings. Compare Federal Communications Commission v. Florida Power Corp., 94 L. Ed. 2d 282 (1987) (upheld federal statute authorizing the FCC to review the rates that utility companies charge cable operators for the use of utility poles, distinguishing Loretto on the basis that nonconfiscatory regulation of rates chargeable for the use of private property devoted to public uses is not a "taking"). See also United States v. Causby, 328 U.S. 256, 261 (1946) (frequent flights immediately above a landowner's property constituted a "taking" "as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it.").

[59] See, e.g., Northwestern Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878)(denying compensation for the banishment of a fertilizing company, originally located outside of Chicago city limits, when the area became inhabited); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 368 (1926)(denying compensation in enforcement of local zoning ordinance)("a nuisance may be merely a right thing in the wrong place, like a pig in a parlor instead of the barnyard").

[60] See, e.g., Miller v. Schoene, 276 U.S. 272 (1928)(uncompensated governmental destruction of red cedar trees infected with a rust endangering nearby apple trees analogized to the regulatory abatement of a public nuisance at common law); Goldblatt v. Hempstead, 369 U.S. 590 (1962)(upholding as a "safety regulation" a zoning law prohibiting a sand and gravel mining enterprise from excavating below the water table, in part on the basis of inconclusive evidence of substantial diminution of the property value).

[61] The Supreme Court has acknowledged that the judicial finding of a "taking" of property involves ad hoc decisionmaking based on the facts of a particular case. Consider Justice William Brennan's statement in the majority opinion of Penn Central Transportation Co. v. New York City, 123-24:

> [The] question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. . . .[Indeed,] we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."

[62] See, e.g., Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (state statute prohibiting underground coal mining which might damage surface property, as applied to affect the rights of a private coal company to engage in such mining under a deed executed by the surface homeowner's predecessor in title, worked a "taking" as it would "destroy previously existing rights of property and contract."). Of course, the question that is difficult to answer is how much diminution in value is "too much." Both before and after Pennsylvania Coal Co., the Supreme Court has indicated a strong reluctance to find a "taking" only on the basis of this variable, at least in the absence of total destruction of property rights. See, e.g., Hadachek v. Sebastian, 239 U.S. 394 (1915) (decrease of value from $800,000 to $60,000 sustained as an uncompensated regulatory loss); Penn Central, 131 ("[T]he decisions sustaining other land-use regulations [reject] the proposition that diminution in property value, standing alone, can establish a "taking"). Indeed, the viability of Pennsylvania Coal Co. itself is in serious question, as the Supreme Court has appeared to undermine its reasoning (although not to reverse its holding) in the recent decision of Keystone Bituminous Coal Association v. DeBenedictis, 107 S.Ct. 1232 (1987) (upholding Pennsylvania statute that authorized a regulatory requirement of maintenance of 50 percent of coal beneath structures as a means of providing surface support for public buildings, private residences, and cemeteries, on the ground that the act would not interfere unduly with investment-backed expectations).

[63] In this regard, compare Penn Central, 136 (New York's historic landmarks preservation law permits Penn Central's continued operation as a railroad terminal containing office space and concessions, and thereby "does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel [or its ability] to obtain a 'reasonable return' on its investment") and Kaiser Aetna v. United States, 444 U.S. 164 (1979) (federal government's attempt to create a public right of access to a lagoon that had been dredged for use as a private marina waterfront found to destroy the investment-backed expectations of the private lagoon owner).

[64] See, e.g., Penn Central, 137. The New York landmarks preservation law allowed owners of landmark sites who had not developed their property to the full extent otherwise permitted under zoning laws to transfer their development rights to contiguous parcels on the same city block. In its determination that the economic impact of the law fell short of a "taking," the Supreme Court took account of the provision of these transferable developmental rights as a feature that "enhances the economic position of the landmark owner in one significant respect." The Supreme Court's understanding of the "average reciprocity of advantage" appears to have taken an unexpected turn in Keystone Bituminous Coal Association v. DeBenedictis (balancing the burdens on coal companies imposed by mine subsidence regulation against the benefits accruing to the companies from restrictions falling on others in different regulatory schemes). For an insightful critique of this approach, see Epstein, "Takings: Descent and Resurrection," in Philip Kurland, ed., *1987 Supreme Court Review* (Chicago: University of Chicago Press, 1987), pp. 22-23 ("For Holmes the test of average reciprocity of advantage was really a way of asking whether the parties whose property was taken received compensation in-kind for the loss in question in the same transaction. . . . Indeed, under Stevens's misdirected rendering of Holmes's test, no restrictions on use ever could be unconstitutional because the state might also right the balance on some future occasion.")

[65] See Clark v. Nash, 198 U.S. 361 (1905); Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906).

[66] See Tribe, *American Constitutional Law*, 8-5 and 9-2.

[67] Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 240 (1984) (Hawaii Land Reform Act served a valid "public use" by employing eminent domain to enable homeowners with long-term land leases to purchase the lots on which they lived). In the last three to four decades, the "public use" doctrine has been assimilated conceptually with the "public purpose" and "rational relationship" standards applied in reviewing regulations of economic interests under the due process clause. See, e.g., Berman v. Parker, 348 U.S. 26 (1954). Essentially, the Supreme

Court has established that, so long as the state's use of eminent domain is rationally related to a conceivable public purpose, the "public use" requirement is satisfied. See Berman, 17-19 (discussion of "rational relationship" standard in economic due process doctrine). The relationship between the broad approach to the "public use" doctrine in eminent domain and the due process "public purpose" doctrine is described in Arvo Van Alstyne, "Public Use," 3 *Encyclopedia*, p. 1494, and Harry N. Scheiber, "Public Purpose Doctrine," 3 *Encyclopedia*, p. 1489.

[68] See Nollan v. California Coastal Commission, 107 S.Ct. 3141 (1987) (invalidating state land-use regulation that conditioned the issuance of a permit to rebuild an oceanfront residence on the property owners' grant to the public of a permanent easement across their beach). The Nollan Court found that the easement condition did not substantially advance the government's alleged purposes, including the public's ability to see and gain access to the beach from the streets in front of the home. The Court concluded that, "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.' " Nollan, 3148.

[69] "It is [by] now commonplace that this Court's review of the rationality of a State's exercise of its police power demands only that the State 'could rationally have decided' that the measure adopted might achieve the State's objective." Nollan, 3151 (Brennan, J., dissenting).

[70] In an "inverse condemnation" action, the private property owner sues to establish that the government has effectively appropriated his property and must pay for it. If the court finds a "taking," the court will order payment of just compensation. This action is distinct from a mandamus or a declaratory judgment action, in which the private owner merely claims that a governmental regulation affecting his property violates his due process rights. Should the court find such a violation, it will merely invalidate the regulation as applied prospectively to the property.

[71] Typically, state courts had not subjected state or local governments to damages or an inverse condemnation award for a legislative or regulatory action that was found to be a taking; they regarded the invalidation of the regulation as the only proper remedy, leaving the private landowner with full prospective use of his property. Essentially, the state courts had denied the private owner any compensation for the "temporary taking" of his property that occurred between the effective date of the state or local regulation and the effective date of the judicial invalidation of the regulation. See, e.g., Agins v. Tiburon, 24 Cal. 3d 266, 598 P.2d 25 (1979), *affirmed on other grounds*, 447 U.S. 255 (1980).

[72] First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S.Ct. 2378, 2388 (1987) ("temporary" takings that deny a landowner all use of his property are not different from permanent takings, for which the Constitution clearly requires compensation).

[73] Ibid., 2389 (indicating that the "temporary taking" doctrine will not apply in the case of "normal delays in obtaining building permits, changes in zoning ordinances, and the like").

[74] The First Evangelical Court did not address the valuation of the "temporary taking" for purposes of "just compensation." It only indicated that, when such a "taking" is found, the owner must be compensated for the full period.

[75] Though exploration of the question is beyond the scope of this analysis, it is interesting to ask whether state and local governments may limit somewhat their exposure to crippling liability for interim damages by enacting more stringent statutes of limitation on inverse condemnation actions challenging land use regulations.

[76] Professor Richard Epstein makes the point that a broad reading of First English and Nollan would have a combined influence that could shift the cost-benefit calculations for land developers who perceive an increased "rate of return" from suits challenging land-use regulations. Epstein, "Takings: Descent and Resurrection," pp. 43-44.

[77] In pertinent part, Amend. XIV, 1 to the U.S. Constitution provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[78] See, e.g., Lochner v. New York, 198 U.S. 45 (1905) (invalidating a New York law regulating the hours and wages of bakery employees as an abridgement of the liberty of contract that violated the due process rights of both employees and employers); Adkins v. Children's Hospital, 261 U.S. 525 (1923) (invalidating a law that established minimum wages for women under due process and equal protection rationales). Between 1899 and 1937, the Supreme Court invalidated state or federal economic and social regulations under the due process clause, usually coupled with the equal protection clause, in approximately 200 cases. For comprehensive surveys of the Court's rulings in this period, see Benjamin F. Wright, *The Growth of American Constitutional Law* (New York: Reynal and Hitchcock, 1942), pp. 153-168; Normal Jerome Small, ed., *The Constitution of the United States; Analysis and Interpretation* (Washington DC: U.S. Government Printing Office, 1964)

[79] Among the most celebrated cases articulating the contemporary doctrines of economic substantive due process and equal protection, see, e.g., Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (sustaining Oklahoma statute that prohibited an optician from fitting or duplicating lenses without a prescription from an ophthalmologist or optometrist, challenged on due process and equal protection grounds); Railway Express Agency v. New York, 336 U.S. 106 (1949) (sustaining a New York City traffic regulation that banned commercial vehicular advertising, except for the vehicle owner's own products).

[80] See, e.g., Williamson v. Lee Optical Co., 488 ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981) ("Although parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational, they cannot prevail so long as 'it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable.' "). In contrast to the Warren Court years, the Burger Court era appeared occasionally to infuse a little "bite" into the "mere rationality" standard. See, e.g., City of Cleburne v. Cleburne Living Center, 105 S.Ct. 3249 (1985) (invalidating under the equal protection clause the application of a

municipal zoning ordinance to deny a special permit for the operation of a group home for the mentally retarded). Clearly, however, such cases expressed the exception to "mere rationality," rather than the rule, for the Burger Court.

[81] See, e.g., Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869 (1985) (invalidating Alabama insurance regulation that taxed out-of-state companies at a higher rate than domestic companies for the illegitimate purpose of promoting the business of domestic insurers by penalizing foreign insurers); Williams v. Vermont, 105 S.Ct. 2465 (1985) (invalidating Vermont automobile sales tax scheme that allowed a credit against state use tax for any sales tax paid in another state only if the taxpayer were a Vermont resident at the time the car was purchased).

[82] In Metropolitan Life Insurance Co., the majority reasoned:

> Alabama's aim to promote domestic industry is purely and completely discriminatory, designed only to favor domestic industry within the State, no matter what the cost to foreign corporations also seeking to do business there. Alabama's purpose . . . constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent. . . . [T]his Court always has held that the Equal Protection Clause forbids a State to discriminate in favor of its own residents solely by burdening "the residents of other state members of our federation."

[83] Metropolitan Life Insurance Co. was decided by a narrow majority of five Justices, with Justice Powell writing the opinion of the Court and Justices O'Connor, Brennan, Marshall and Chief Justice Rehnquist in dissent. Of course, Justice Kennedy's arrival on the Court and any changes in the Court's composition in the near future would render any projections regarding a "new era" of constitutional protection for private economic liberty (under the equal protection clause, however, instead of under economic substantive due process) totally speculative.

[84] This point was demonstrated emphatically by the dissenting Justices in Metropolitan Life Insurance Co., who viewed the majority opinion as charting an "ominous course," that "has serious implications for the authority of Congress under the Commerce Clause." Noting that Congress in the *McCarran-Ferguson Act* had explicitly placed insurance regulation "firmly within the purview of the several States," the dissenters objected to the majority's use of the equal protection clause as an instrument of federalism: "Surely the Equal Protection Clause was not intended to supplant the Commerce Clause, foiling Congress' decision under its commerce powers to 'affirmatively permit [some measure] of parochial favoritism' when necessary to a healthy federalism." 470 U.S. at 899 (O'Connor, J., dissenting).

[85] Indeed, soon after Metropolitan Life Insurance Co. was decided, the Court unanimously upheld against challenges under the commerce and equal protection clauses the laws of Connecticut and Massachusetts, that limited the creation or acquisition of in-state banks to banking corporations located in the six-state New England region. Northeast Bancorp, Inc. v. Board of Governors of Federal Reserve System, 472 U.S. 159 (1985). The Court found that a federal statute, the *Bank Holding Company Act of 1956*, itself authorized the individual states to balkanize the banking industry. Moreover, the Court deemed the "independence of banking institutions" to be a legitimate state objective to which the laws bore a rational relationship. In concurrence, Justice O'Connor argued that the state schemes in Northeast Bancorp were indistinguishable from that in Metropolitan Life Insurance Co., and suggested that the latter ruling might have confined Metropolitan Life to its peculiar facts. 472 U.S. 178-9 (O'Connor, J., concurring).

[86] See Sunstein, "Naked Preferences and the Constitution," *Columbia Law Review* 84 (1984): 1689.

[87] Art. III, 2 of the U.S. Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.

The text of Art III would appear to grant appellate jurisdiction to the Supreme Court to review any state court decision involving a question of federal law, regardless of the manner in which the state court resolved the case, and to grant original jurisdiction to inferior federal courts to decide any such case in the first instance. Doctrinal restraints on such an expansive power have been self-imposed by the Supreme Court and lower federal courts, in their interpretation of Art. III and federal statutory grants of jurisdiction.

[88] As articulated concisely by the Supreme Court in Fox Film Corp. v. Mueller, 296 U.S. 207, 210 (1935), the independent and adequate state grounds doctrine embodies "the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, [Supreme Court] jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment."

[89] For example, if a state high court determines that the right of the media to broadcast copies of court tape recordings can be upheld under both the First Amendment of the U.S. Constitution and state constitutional guarantees of speech and press rights, the U.S. Supreme Court should deny appellate jurisdiction to review the state court's potentially erroneous decision under the First Amendment, provided the state constitutional law holding does not rely substantively on the federal law decision and would sustain the judgment alone if the federal law holding were undermined upon review. See State v. Coe, 101 Wash. 2d 364, 679 P.2d 353, 359-62 (1984).

[90] In Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945), Justice Robert Jackson characterized the doctrine as a preventative against Supreme Court issuance of "advisory opinions" in violation of the Art. III case or controversy requirements. Arguably, use of this metaphor is unfortunate. By casting the doctrine as a device to prevent "advisory opinions," Justice Jackson raised it to the level of a constitutional justiciability requirement, similar to the standing or political question doctrines. This characterization does not recognize the nature of the restraint as a self-imposed or prudential limitation on the Supreme Court's appellate jurisdiction. For critiques of the constitutional basis for the doctrine, see, e.g., Richard A. Matasar and Gregory S. Bruch, "Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine," *Columbia Law Review* 86 (1986): 1291, 1317-22.

[91] Several well-established principles guide Supreme Court review of a state high court judgment that bars consid-

eration of a federal law claim because of a procedural default:

1) The determinative issue—whether a federal law claim was sufficiently and properly raised in the state courts—is itself ultimately a question of the "adequacy" of the state law ground. Because the issue implicates the scope of the Supreme Court's own jurisdiction, it presents a federal question as to which the Court is not bound by the state court ruling. Street v. New York, 394 U.S. 576, 583 (1969).
2) The enforcement of state court procedure at the expense of a hearing of a federal law claim, at the very least, must pass muster under the "fundamental fairness" requirements of the Fourteenth Amendment due process clause. Reece v. Georgia, 350 U.S. 85 (1955).
3) Even if enforcement of a state court procedural rule would meet "fundamental fairness," it will not bar Supreme Court review of a federal claim if the rule were applied with a specific intent to deprive a claimant of his federal rights or if it "unreasonably interfer[ed] with the vindication of such rights." James v. Kentucky, 466 U.S. 341, 348-9 (1984)(state procedural requirement had not been consistently applied in prior cases); Williams v. Georgia, 349 U.S. 375, 383 (1955) (state court refusal to exercise discretion deemed "in effect, an avoidance of the federal right").

Although the Supreme Court appeared to expand the scope of its review despite procedural default in Henry v. Mississippi, 379 U.S. 443, 447 (1965) (balancing the importance of the claim of federal right against the utility of the state's enforcement of its procedural requirement in the specific case at bar, insofar as it furthers a legitimate state interest), subsequent retrenchment in the Court's standards for federal habeas corpus jurisdiction may have undermined the intellectual supports for Henry's broad approach to the Court's direct appellate review. See, e.g., Stone v. Powell, 428 U.S. 465 (1976) (no habeas corpus relief if state court procedure afforded a "full and fair" opportunity to litigate a federal constitutional claim); Wainwright v. Sykes, 433 U.S. 72 (1977) (habeas corpus review of state court judgment turning on failure to comply with "contemporaneous-objection" rule barred unless defendant demonstrates "cause" for the procedural defect and resulting "prejudice").

[92] Assuming the "independence" of a state substantive law basis for a judgment, as long as the basis itself did not violate the federal Constitution, it generally would be deemed "adequate."

[93] See, e.g., State v. Badger, 141 Vt. 430, 450 A.2d 336, 347 (1982) (claimant's rights sustained independently under Vermont Constitution after determining that there was a corresponding right available under federal law); State v. Coe, 361-62 (first granting relief under state constitutional law, and then proceeding to establish federal claims under federal law).

[94] For classic examples of state court rulings that automatically presume that federal constitutional decisions shape the character and contours of state constitutional law guarantees, see, e.g., Washington v. Fireman's Fund Inc. Co., 708 P.2d 139 (Haw. 1985); State v. Jackson II, 672 P.2d 255, 260 (1983) [discussed and critiqued in Ronald Collins, "Reliance on State Constitutions: The Montana Disaster," *Texas Law Review* 63 (1985): 1095]. Both decisions sustained the constitutionality of the state laws against challenges by the rights claimants. An insightful and imaginative account of four conceptual models for the "relationships" of state and federal constitutional laws is presented in Collins and Galie, "Models of Post-Incorporation Judicial Review."

[95] Michigan v. Long, 463 U.S. 1032 (1983). Prior to Michigan v. Long, the Supreme Court had adopted a variety of methods for resolving the issue of the "independence" of a state law ground: (1) dismissal in the case of unclear grounds for decision, see, e.g., Lynch v. New York, 293 U.S. 52 (1934); (2) remand to the state high court for clarification of the grounds for decision, see, e.g., Minnesota v. National Tea Co., 309 U.S. 551 (1940); (3) examination of state law rulings to discern whether state courts generally used federal law merely to guide application of state law, see, e.g., Texas v. Brown, 460 U.S. 730 (1983)(plurality opinion). These cases and other similar decisions were cited and characterized as failing important interests of federalism by the Michigan Court, 1038.

[96] Ibid., 1041.

[97] Ibid. (emphasis added).

[98] Laurence Tribe considers this ramification of the Michigan v. Long standard to be central to the autonomy of state law. See Tribe, *American Constitutional Law*, p. 166.

[99] Michigan, 1041. Critics of the Michigan v. Long approach have argued, of course, that the balance among federalism interests was struck in a manner that accords insufficient respect for state court autonomy. Mr. Justice Stevens, in his dissenting opinion in Michigan v. Long, claimed to be "thoroughly baffled by the Court's suggestion that it must stretch its jurisdiction and reverse the judgment of the Michigan Supreme Court in order to show 'respect for the independence of state courts.' " Michigan, 1072 (J. Stevens, dissenting). See, e.g., Ronald Collins, "Reliance on State Constitutions: Some Random Thoughts," *Mississippi Law Journal* 54 (1984): 371, 400-01 (suggesting a "less intrusive presumption" to vindicate the autonomy of state judiciaries, such as a rule on unreviewability in the absence of a "plain statement" that state law does not provide the relief sought). Contrast Martin Redish, "Supreme Court Review of State Court 'Federal' Decisions: A Study in Interactive Federalism," *Georgia Law Review* 19 (1985): 861 (arguing that Michigan v. Long is not "invasive" of state court prerogatives in any meaningful sense).

[100] An enigmatic footnote in the Michigan v. Long majority opinion, 1041 n. 6, gives reason for concern over what, indeed, will constitute a sufficient demonstration of a "bona fide separate, adequate, and independent" state law ground:

> There may be certain circumstances in which clarification is necessary or desirable, and we will not be foreclosed from taking the appropriate action.

Post-Long decisions indicate that the Supreme Court may well exercise review in the face of any ambiguity over the basis of a state high court judgment. Compare Ohio v. Johnson, 467 U.S. 493 (1984) and Florida v. Myers, 446 U.S. 380 (1984) (appellate review due to failure to indicate clearly that decision was based ultimately on state law) with Uhler v. AFL-CIO, 468 U.S. 1310 (1984) (California Supreme Court's prohibition of a ballot initiative rested on independent state ground because of state court's detailed analysis of state law).

[101] All of the analytic devices described in the text were employed to advantage in Carreras v. City of Anaheim, 768 F.2d 1039 (9th Cir. 1985) (municipal ordinance banning solicitation of religious donations outside public conven-

tion center violates California's constitutional guarantees of speech liberties). In particular, see Carreras, 1042-43 (prefatory discussion of the role of state law as first basis for consideration of claims of right), 1042 n.4 (acknowledging rule of avoidance of unnecessary federal constitutional questions), 1044 n.7 (establishing trend of greater protection for expressive activity under state constitutional law than under First Amendment), 1043-45 and 1048-50 (analysis of state constitutional precedents alone for governing rules and standards), 1044 n.8 and 9 (ensuring that controlling state constitutional law precedents themselves rested on state law), 1048 n.21 and 1049 n. 24 and 25 (explicitly stating that citation to federal judicial precedents in past state supreme court decisions, and past adoption of analytical frameworks developed by the Supreme Court under the federal constitution, served only to guide independent interpretation of the state constitution). Given its self-conscious, deliberate, and artful use of the full battery of analytic devices, Carreras stands as an excellent case study and role model for the independent interpretation of state constitutional law. It is interesting to note that a federal appeals court was responsible for such a splendid example of state constitutional exegesis.

[102] In this regard, a comparison of two state high court decisions may be instructive. Compare State v. Badger (acknowledging that separate consideration of Vermont constitutional claims is required and that the state constitutional meaning is not identical to federal constitutional meaning even for parallel provisions; relying exclusively on state court precedents in interpreting state constitutional provisions; providing "plain statement" that judgment rests on state constitutional guarantees) with Patchogue-Medford Congress of Teachers v. Board of Education, 70 N.Y.2d 57, 510 N.E.2d 325 (1987) (explicitly acknowledging reliance on both federal and state constitutional law because violation of the former is violation of the latter; interweaving discussion of federal and state constitutional texts and court precedents; analyzing the determinative issues as substantively identical under federal and state constitutional law; providing no "plain statement" that the judgment is grounded on state constitutional law).

[103] For comprehensive and thoughtful analyses of the abstention and equitable restraint doctrines, see H. Fink and M. Tushnet, *Federal Jurisdiction: Policy and Practice*, pp. 615-638, 655-675, 681-694 (1984); Martin Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* (Indianapolis: Bobbs-Merrill, 1980), pp. 233-58, 291-321.

[104] The Pullman abstention doctrine derives from the rule in Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941) (requiring federal district court abstention from decision of Fourteenth Amendment equal protection claim, to afford the Texas state courts an opportunity to rule on the state statutory claim of abuse of discretion in the commission's order to segregate operation of railroad sleeping cars).

[105] A federal ruling on a sensitive federal constitutional issue might be tentative or "wasteful" in the sense that interpretation of an unclear state law by the state courts might well moot the federal constitutional issue. For example, the Supreme Court understood in Pullman that because the last word on the statutory authority of the railroad commission could issue only from the Texas Supreme Court, any decision on the constitutionality of the commission's segregation order would be a "tentative answer which may be displaced tomorrow by a state adjudication. . . . The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court." Pullman, 500.

[106] For analysis and critique of the functions of the Pullman abstention doctrine, see Martha A. Field, "Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine," *University of Pennsylvania Law Review* 122 (1974): 1071; Martha A. Field, "The Abstention Doctrine Today," *University of Pennsylvania Law Review* 125 (1977): 590.

[107] Abstention to permit a state constitutional law attack on a state law is typically deemed improper where the state constitutional provision is virtually identical to the applicable federal constitutional provision. See, e.g., Wisconsin v. Constantineau, 400 U.S. 433 (1971) (refusing to order abstention to permit state court scrutiny of state liquor regulation under state constitutional law). Abstention in such circumstances would be tantamount to a rule of exhaustion of state judicial remedies before bringing a federal action on federal constitutional grounds, a prerequisite which the Supreme Court has not been willing to impose. See, e.g., Monroe v. Pape, 365 U.S. 167 (1961).

[108] See, e.g., Louisiana Power and Light v. City of Thibodaux, 360 U.S. 25 (1959) (requiring abstention in a diversity action challenging the authority of state municipalities to condemn utility properties, since the delegation of eminent domain powers to localities is a question "intimately involved with the sovereign prerogative").

[109] See, e.g., Burford v. Sun Oil Co., 319 U.S. 315 (1943) (upheld abstention in a challenge to a drilling permit issued under a Texas state scheme creating a complex and coherent pattern of administrative and judicial decision-making to resolve oil rights issues); Alabama Public Service Commission v. Southern Railway Co., 341 U.S. 341, 347 (1951) (requiring abstention in a challenge to the commission's order to continue certain local train service, on the rationale that resolution of the dispute depends on the "predominantly local factor of public need for the service rendered.").

[110] For example, in Burford, 326-27, the Supreme Court explained that the Texas legislature had established a unified state administrative and judicial network to regulate the production of oil and gas, and that state judicial review of the Commission's orders was speedy and thorough. Indeed, to prevent confusion of multiple review of legal issues involving the state scheme, the legislature had provided for concentration of all direct review of the commission's orders in the state districts of one county. The exercise of federal equity jurisdiction in this case would create the "very 'confusion' which the Texas legislature and Supreme Court feared might result from review by many state courts of the Railroad Commission's orders." Burford, 327.

[111] See, e.g., Zablocki v. Redhail, 434 U.S. 374 (1978) (invalidating Wisconsin statute that required court permission for remarriage of a state resident under legal obligation to provide child support). The Supreme Court distinguished Burford v. Sun Oil on the basis that "this case does not involve complex issues of state law, resolution of which would be 'disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.' " Burford, 380. Importantly, the state statute in Zablocki implicated a substantial question of federal constitutional law, on which resolution of the case ultimately turned. Professor Martin Redish argues that abstention from the exercise of diversity jurisdiction

should be restricted to controversies in which (1) the regulatory policy is "of significant and special concern to the state"; (2) the administrative scheme is, "in fact, detailed and complex"; and (3) any substantial and troublesome federal question "cannot be resolved without requiring the federal court to immerse itself in the technicalities of the state scheme." Redish, *Federal Jurisdiction*, pp. 246, 259. But see Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593 (1968) (diversity suit for trespass, involving no complex regulatory or administrative scheme).

[112] Mr. Justice Hugo Black first used the term "Our Federalism" in the celebrated case of Younger v. Harris, 401 U.S. 37 (1971), to announce the principle of "comity" between federal and state courts on which the Court has relied in formulating the rules of the equitable restraint doctrine.

[113] In summary, the equitable restraint doctrine yields the following rules:

1) At the time a litigant initiates a federal proceeding to challenge state action as unconstitutional, if the litigant is a defendant in a pending or ongoing state criminal proceeding, and if the federal litigant can raise the constitutional claims in the state proceeding, ordinarily the litigant will not be able to obtain federal injunctive or declaratory relief.

   Younger v. Harris, 401 U.S. 37 (1971) (federal injunctive relief against state criminal prosecution); Samuels v. Mackell, 401 U.S. 66 (1971) (federal declaratory relief against criminal statute enforced in pending prosecution).

2) A federal district court may grant declaratory or injunctive relief against unconstitutional state action if the federal litigant does not become a defendant in a state criminal prosecution concerning the same issues before proceedings of substance on the merits have begun in the federal action.

   Steffel v. Thompson, 415 U.S. 452 (1974) (federal declaratory relief where genuine threat of enforcement of unconstitutional state statute demonstrated); Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) (preliminary injunctive relief to preserve status quo pending declaratory judgment); Hicks v. Miranda, 422 U.S. 332 (1975) ("proceedings of substance" restriction).

3) At the time a litigant initiates a federal proceeding to challenge state action as unconstitutional, if the litigant is a defendant in a pending state civil suit brought by state officials to enforce important state policies, and if the federal constitutional claims may be raised and litigated fully in the state proceeding, ordinarily the litigant will not be able to obtain federal injunctive or declaratory relief.

   Huffman v. Pursue, 420 U.S. 592 (1975) ("quasi-criminal" nuisance abatement action); Juidice v. Vail, 430 U.S. 327 (1977) (civil contempt proceeding to effectuate a state damage judgment); Trainor v. Hernandez, 431 U.S. 434 (1977) (state civil action to recoup welfare payments obtained by fraud); Moore v. Sims, 442 U.S. 415 (1979) (extending equitable restraint to federal issues between the parties that are not directly implicated in the pending state civil proceeding).

4) The rules above do not apply if the pending or ongoing state proceeding has been initiated in bad faith or as part of a program of harassment, or if a federal litigant's constitutional claim concerns the procedural fairness of the very state proceeding in which constitutional claims would otherwise be brought.

   Dombrowski v. Pfister, 380 U.S. 479 (1965) (exception for bad faith and harassment); Gibson v. Berryhill, 411 U.S. 564 (1973) (bias on state board of optometry); Trainor v. Hernandez, (appropriate forum in which to challenge unconstitutional state action must be available in state court system). But see Ohio Civil Rights Commission v. Dayton Christian Schools, 477 U.S. 619 (1986) (no exception to equitable restraint principles for federal due process challenge to the jurisdiction of the administrative tribunal).

[114] In Trainor v. Hernandez, 445-56, the Supreme Court recognized that the exercise of federal equitable jurisdiction at the time that a state civil enforcement suit was pending would

> . . . confront the State with a choice of engaging in duplicative litigation, thereby risking a temporary federal injunction, or of interrupting its enforcement proceedings pending decision of the federal court at some unknown time in the future. It would also foreclose the opportunity of the state court to construe the challenged statute in the face of the actual federal constitutional challenges that would also be pending for decision before it, a privilege not wholly shared by the federal courts.

[115] The Supreme Court has articulated forcefully its purpose to avoid the "unseemly failure to give effect to the principle that state courts have the solemn responsibility, equally with the federal courts 'to guard, enforce, and protect every right granted or secured by the Constitution of the United States.' " Steffel v. Thompson, 415 U.S. at 460-61.

[116] For a persuasive critique of the contradictory bases for the equitable restraint doctrine, see Redish, *Federal Jurisdiction*, pp. 298-307.

[117] Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Jackson, J., concurring) (original reference to "power in the hands of Congress").

Chapter 3

Government Structure under State Constitutions

In the American federal system, there are few national requirements governing the structure and relationship of state government institutions. States are not even directly required to have constitutions. Some thought was given to a "model" state constitution that would have been mandated by the Continental Congress early in 1776, but the idea was dropped without being considered seriously.[1] Article IV, Section 4 of the U.S. Constitution does provide that "the United States shall guarantee to every State in this Union a Republican Form of government...."[2] In 1912, however, when the argument was made that Oregon's constitutional provision for the passage of legislation by popular initiative violated the requirement of a "republican" (government by elected representatives) government, the U.S. Supreme Court reaffirmed its long-held position that this issue constitutes a nonjusticiable political question left to congressional enforcement.[3] Congress, of course, may require the inclusion of provisions in a state constitution as a condition to the admission of new states.[4]

In addition, the federal Constitution does provide a few limitations on the exercise of state power, for example, to regulate commerce and coin money. Most of these restrictions on state power were, in part, direct responses to perceived abuses perpetrated by the powerful, and relatively unchecked, state legislatures during the decade before adoption of the federal Constitution.

Finally, the Fourteenth Amendment and its judicial interpretation for more than a half a century have imposed a range of restrictions on states with respect to various individual rights and liberties. Beyond these limits, however, the American states remain free to devise and change governmental institutions and arrangements as their citizens see fit. As Justice Oliver Wendell Holmes said:

> We shall assume that when, as here, a state Constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned.[5]

Thus, with respect to governmental structure, a state remains free to, in the famous words of Justice Louis Brandeis, "serve as a laboratory"[6] for what Holmes referred to as "social experiments ... in the insulated chambers afforded by the several states."[7]

The American states have played this role of experimenting with governmental structure and relationships since the beginning of the Union. Thomas Paine, defending Pennsylvania's 1776 constitution, which featured a unicameral legislature, weak executive, and virtually no checks and balances, wrote in 1778:

> It is in the interest of all the States, that the constitution of each should be somewhat diversified from each other. We are a people founded upon experiments, and ... have the happy opportunity of trying variety in order to discover the best. . . .[8]

One very good example of the states' experiments with government structure can be seen in the area of the "legislative veto." States put in place mechanisms by which legislatures could, short of enacting a law, disapprove of administrative agency actions. The separation of powers problems with this approach were debated in the state courts, with the nearly unanimous conclusion that such mechanisms could not be permitted. Then the people in various states rejected proposed state constitutional amendments that would have permitted the practice. Most of this activity predated the resolution of similar problems in the federal government.[9]

Despite the permitted diversity with respect to governmental structure, there are many identifiable patterns and similarities among the state governments. As Frank P. Grad observed: "In spite of their enormous diversity, it is probably safe to say that the similarities between government structure in different states are considerably greater than their differences. . . ."[10]

The Function of State Constitutions Regarding Governmental Structure

At the outset, it must be recognized that the political and legal functions of state constitutions are very different from those of the federal Constitution. The U.S. Constitution creates and defines a government of limited, enumerated, delegated powers. The federal government must point to some explicit or implied grant of power to authorize it to act. Therefore, many of the key questions regarding judicial interpretation of federal power under the Constitution concern implied powers. The state governments, by contrast, are based on a very different fundamental conception of government. State governments, particularly the legislative branch, exercise all residual or plenary powers of sovereign governments, except in situations where they are expressly or impliedly limited by the state or federal constitutions, or by valid congressional legislation or federal administrative action. It is sometimes said that state governments exercise power similar to that possessed by the British Parliament. Therefore, many of the important issues for judicial interpretation of state power under state constitutions concern implied limitations.

In the words of the Supreme Court of Kansas:

> It is fundamental that our state constitution limits rather than confers powers. Where the constitutionality of a statute is involved, the question presented is, therefore, not whether the act is authorized by the constitution, but whether it is prohibited thereby.[11]

According to the Supreme Court of Illinois, "All legislative power is vested in the General Assembly. . . . Every subject within the scope of civil government which is not within . . . constitutional limitations may be acted on by it."[12]

The function of state constitutions, not surprisingly, dictates their form. Generally speaking, because of the necessity to enunciate specific limitations on otherwise virtually unlimited governmental power, state constitutions contain much more detail with respect to the structure and operations of government. For example, state constitutions contain long articles on taxation and finance, two of the most important functions of any government. These provisions restrict state government taxing and spending in a range of ways that is unfamiliar in the federal government.

Further, because state constitutions are easier to amend than the federal Constitution, they have accumulated many limiting details reflecting the concerns of citizens during the various eras of American history. For example, evidence of the periods of distrust of the legislature, the Industrial Revolution, the Progressive Movement, Jacksonian democracy, the settling of the West, bankruptcy in public finance, concern for efficient management, and many other matters can be seen clearly in any modern state constitution.

Finally, the state constitutions include numerous mechanisms for direct popular involvement in governmental decisions that have no analog in the federal Constitution. Amendments or revisions of state constitutions themselves must be ratified by the voters before they can take effect. Beyond this fundamental point, however, direct citizen involvement in such governmental decisions as issuing bonds, levying certain taxes, and even, in some states, approving gambling operations, is often required by state constitutions. States with initiative and referendum provisions in their constitutions obviously permit direct popular participation in the lawmaking process itself. Also, many states permit citizen litigation over governmental matters by authorizing a wide range of taxpayer actions. None of these examples of popular participation in governmental decisions are present in the U.S.Constitution.

State Constitutions and Separation of Powers

James Madison noted in *The Federalist*, No. 37, that "no skill in the science of government" has been able conclusively to define legislative, executive, and judicial power. As a result, "[Q]uestions daily occur. . . which puzzle the greatest adepts in political science." Matters have remained just as unsettled in the state constitutions in the 200 years since Madison wrote those words.

Many state constitutions, by contrast to the federal Constitution, contain explicit textual statements of the doctrine of separation of powers. For example, Article II, Section 3 of the Florida Constitution provides:

> The powers of the state government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

These sorts of statements date from the earliest state constitutions in 1776.[13] They express two related concerns: that the *powers* of government should be separated; and that the *persons* who exercise these powers should be separate individuals. It has always been true, however, that the state constitutions, like the U.S. Constitution, do not provide for a sharp separation of powers; instead, they include a number of blended powers. For example, it is generally conceded that the governor's veto, although assigned to the chief executive officer, is actually a legislative power.

An important question must be asked about the impact of placing explicit statements of the separation of powers doctrine in state constitutions. Should these explicit statements have an impact on judicial determination of separation of powers controversies so as to yield results different from those obtaining under the federal Constitution, where the doctrine is merely inferred from that document's creation of three branches? Courts in Florida have concluded that with respect to delegations of power to administrative agencies a more strict separation of powers is required because of the explicit textual statement in the state constitution.[14] New Jersey courts, by contrast, despite the presence in that state's constitution of a provision virtually identical to Florida's,[15] reach the opposite conclusion:

> There is no indication that our State Constitution was intended, with respect to the delegation of legislative power, to depart from the basic concept of distribution of the powers of government embodied in the Federal Constitution. It seems evident that in this regard the design spelled out in our State Constitution would be implied in constitutions which are not explicit in this regard. . . . We have heretofore said our State Constitution is "no more restrictive" in this respect than the Federal Constitution. . . . Indeed in our State the judiciary has accepted delegations of legislative power which probably exceed federal experience.[16]

Generally speaking, however, state courts seem to enforce the separation of powers doctrine, at least in the area of delegations of legislative authority to agencies, more strictly than is the case with separation of powers doctrine in the federal government.[17]

The State Legislative Branch

> State legislatures are, historically, the fountainhead of representative government in this country. A number of them have their roots in colonial times, and substantially antedate the creation of our Nation and our Federal Government. In fact, the first formal stirrings of American political independence are to be found, in large part, in the views and actions of several of the colonial legislative bodies.
>
> *Chief Justice Earl Warren*[18]

Despite the legal and political changes that have occurred since 1776, resulting in the types of limitations on the state legislative branch described below, state legislatures remain extraordinarily powerful. They are the focal point of policymaking in state government. The prevailing view is illustrated by the Supreme Court of Illinois:

> Under traditional constitutional theory, the basic sovereign power of the State resides in the legislature. Therefore, there is no need to grant power to the legislature. All that needs to be done is to pass such limitations as are desired on the legislature's otherwise unlimited power.[19]

Limitations on Legislative Power

A commentator observed in 1892 that "one of the most marked features of all recent State constitutions is the distrust shown of the legislature."[20] The transition from early state constitutions granting unfettered legislative power to the more recent constitutions restricting legislative power reflects one of the most important themes in state constitutional law. The clearly established pattern during the founding decade of 1776-1787 was a gradual transition from legislative dominance, or "omnipotence," to an increased role for the executive and judicial branches.[21] The new executive and judicial powers operated as a check on recognized legislative power rather than a sharing of legislative power.

In 1776 and the years immediately following, virtually all of the newly independent constitution-makers' trust was placed in the legislative branch, albeit usually in two houses. It was generally felt that, under the newly flourishing ideas of republicanism, representatives in government should be like the citizens themselves and mirror as closely as possible the makeup of the population.[22] The idea of professional politicians or representatives had not yet developed. Rather, the virtuous members of society would serve, on a rotating basis, for short terms, representing small districts, and honor instructions from their constituents. As Gordon Wood has observed, at this time, "a tyranny by the people was theoretically inconceivable."[23]

The legislative branch had been identified with the people themselves and was viewed as a safeguard against executive abuses rather than a possible source of abuses itself. Under these circumstances, the 1776 brand of legislative supremacy, although not supported unanimously, was not surprising. Effective checks on this legislative power were not viewed by many as necessary because, after so many years of abuses by the British, the newly independent Americans did not foresee that "the people," as represented in the legislature, would also commit abuses.

This philosophy soon began to change, however, as experience under the new legislative supremacy proved to be less than satisfactory. The range of highly visible legislative abuses, such as suspension of debts, seizure of the property of Loyalists, generous authorization of paper money, and legislative interference with the executive and judicial branches, began to raise concerns. Increased executive veto power came to be viewed as not inconsistent with popular sovereignty but, rather, as a necessary mechanism to limit legislative power. In this way, even within revolutionary republican rhetoric, with its absence of reliance on a hierarchial social structure that had justified "balanced government," the case could be made for checks on the misuse of power by government officials.[24] In Gordon Wood's words, "The Americans' inveterate suspicion and jealousy of political power, once concentrated almost exclusively on the Crown and its agents, was transferred to various state legislatures."[25]

The transition in American history has been from relatively unfettered legislative power to a more evenly balanced distribution of governmental powers among the branches. In addition, the legislative articles of modern state constitutions reflect two important characteristics: (1) the insertion of specific "constitutional legislation" into state constitutional texts, thereby supplanting legislative prerogatives and sometimes leading to a limitation of legislative alternatives through judicially discovered "negative implications" and (2) the insertion into state constitutions of detailed procedural requirements that the legislature must follow in the enactment of statutory law.

Negative Implication

Many state constitutions include provisions that could be relegated to statutory law. When these provisions mandate legislative actions or grant authority to a legislature vested with plenary power, courts can transform these apparent grants of power into limitations on legislative power. As Frank Grad noted:

> It must be emphasized that very nearly everything that may be included in a state constitution operates as a restriction on the legislature, for both commands and prohibitions directed to other branches of the government or even to the individual citizen will operate to invalidate inconsistent legislation. . . . In constitutional theory state government is a government of plenary powers, except as limited by the state and federal constitutions. . . . In order to give effect to such special authorizations, however, courts have often given them the full effect of negative implications, relying sometimes on the canon of construction *expressio unius est exclusio alterius* (the expression of one is the exclusion of another).[26]

For these reasons, many apparent grants of authority become, through judicial interpretation, limits on legislative power. This can be a hidden dimension of state constitutional language, which, when interpreted by state courts, can transform grants into limits. For example, many state constitutions contain fairly explicit provisions on legislative compensation which, of course, would be within the legislative power even in the absence of such constitutional provisions. If the legislature seeks, by statute, to provide some other form of compensation, it is often argued that the constitutional provision contains an implied limitation on legislative authority in the area of compensation.[27]

Procedural Limitations on the Enactment of Statutes

The legislative articles of virtually all state constitutions contain a wide range of limitations on state legislative processes. Generally, these *procedural* limitations did not appear in the first state constitutions. Instead, they were adopted throughout the 19th century in response to perceived abuses of legislative powers. Last-minute consideration of important measures; logrolling; mixing substantive provisions in omnibus bills; low visibility and hasty enactment of important, and sometimes corrupt, legislation; and the attachment of unrelated provisions to bills in the amendment process—to name a few of these abuses—led to the adoption of constitutional provisions restricting the legislative process. These constitutional provisions seek generally to require a more open and deliberative state legislative process, one that addresses the merits of legislative proposals in an orderly and deliberative manner.

Familiar examples of state constitutional limitations on the legislature include requirements that a bill contain a title disclosing its content and include only matters on a "single subject";[28] that all bills be referred to committee;[29] that the vote on a bill be reflected in the legislature's journal;[30] that no bill be altered during its passage through either house so as to change its original purpose;[31] and that appropriations bills contain provisions on no other subject.[32] These procedural restrictions must be distinguished from the common *substantive* limits on state legislation, such as those prohibiting statutes limiting wrongful death recoveries[33] or mandating a certain type of civil service system,[34] and from the general limits contained in state bills of rights.

Such procedural requirements for enacting statutes provoke criticism on a number of grounds, ranging from the claim that the requirements "have caused considerable damage through invalidation of noncomplying laws on technical grounds,"[35] to the assertion "that an argument based on the one subject rule is often the argument of a desperate advocate who lacks a sufficiently sound and persuasive one."[36] Judicial precedents add little certainty to the application of the generally worded title and single-subject requirements.

Despite such criticism, the limitations on state legislative procedure survived the wave of state constitutional revision that occurred during the middle of the 20th century. Therefore, because these limits have, in effect, been readopted in contemporary state constitutions, they reflect policies relating to the nature of the deliberative process in state legislatures. Further, they represent an important limit on legislative authority and illustrate the lasting result of earlier public disillusionment with legislative abuses.

Although the procedural limits outlined above are usually discussed as if they were all of the same quality, there are important differences. Some provisions require the legislature to act affirmatively, while others prohibit certain acts. A violation of certain restrictions, such as title and single-subject provisions, can be seen from examining the text of the final legislative enactment. By contrast, a violation of other restrictions, such as the prohibition of a bill being altered on its passage through either house so as to change its original purpose, will not be reflected on the face of the final legislative enactment. Consequently, a search for this type of violation requires an examination of the procedure leading to the enactment.

State courts have developed a surprisingly wide range of approaches to enforcing restrictions on legislative procedure under circumstances where an act on its face does not violate procedural limitations. Some courts will not "go behind" an enrolled bill, duly signed by legislative officers, to consider evidence of violation of legislative procedure provisions in state constitutions. Other courts will scrutinize the official legislative journals but not other evidence. Still other courts will consider any relevant evidence of such state constitutional violations. Even within single jurisdictions, one can detect inconsistent doctrines and a lack of continuity over time. These widely varying judicial doctrines reflect what are essentially political decisions, made in the context of adjudicating actual controversies, concerning the extent of judicial enforcement of state constitutional norms. On rare occasions, these procedural provisions may invalidate a statute. More importantly, such restrictions make the state legislative process significantly different from, and more rigidly structured than, the congressional legislative process.[37]

Direct Legislation

The initiative and referendum movement that emerged at the turn of this century was another indication of public dissatisfaction with state legislatures. Initiatives enable the public to bypass unresponsive state legislatures, and referenda provide a check on the effect of unpopular statutes. These devices are more sophisticated than the earlier procedural restrictions, most of which reflected general disapproval of legislative actions. The initiative allows the people to take direct action when the legislature refuses to act. The referendum enables the people to target specific enactments rather than depend on the indirect deterrence of procedural restrictions.

Although state constitutions contained specific provisions requiring a referendum on such questions as assumption of debts and changes in the constitutional text, the people of South Dakota began the process of taking back, or reserving to themselves, a measure of general legislative power in a constitutional amendment approved in 1898. Now, 21 states provide for the statutory initiative, and 25 provide for the referendum.[38] One observer predicted that "[t]he more direct legislation you have. . . the greater the body of judge-made law."[39] This view raises interesting and complex questions of political philosophy, especially today when many major public issues are resolved at the ballot box.[40] Legal questions also arise with regard to initiated statutes: (1) Can they be amended or repealed by the legislature? (generally yes, unless the state constitution provides to the contrary); (2) Can they be vetoed by the governor? (generally no); (3) Do the title and single-subject limitations apply? (generally yes); (4) How should courts interpret such statutes? (according to the understanding of the ordinary, intelligent voter).

The State Executive Branch

Public distrust of the executive branch, as reflected in the early state constitutions, historically has been inversely related to public distrust of the legislative branch. The executive branch began in disfavor,[41] but has gained more power and authority over the centuries. State constitutions have been amended gradually to bring gubernatorial powers closer to those assigned to the President under the federal Constitution, including longer terms of office (all but two states now have four-year gubernatorial terms) and stronger budgetary authority.

Constitutional Duties and Agencies

Although the executive branch's main responsibility is usually thought of as the faithful execution of the laws, state constitutions directly assign numerous functions to governors and executive branch officials and agencies. For example, constitutions often assign the power of executive clemency to the governor, thereby insulating the exercise of that power from legislative or judicial interference.

The people in many states have created executive agencies through "constitutional legislation."

The status of such constitutional agencies or offices in relation to the legislature can be very different from statutorily created executive agencies or offices. For example, the Florida Supreme Court invalidated a *statute* prohibiting hunting on Sundays on the ground that it conflicted with an *administrative rule* of the constitutionally established Game and Fish Commission. The rule provided for a one-month hunting season that included Sundays.[42]

Most state constitutions also provide for the statewide election of executive officials other than the governor. Therefore, such officials as attorneys general, secretaries of state, commissioners of education, state treasurers, and others, in states where such offices are constitutionally created, develop their own constitutional and political base or power, necessarily detracting from centralized gubernatorial power. In Florida, where the governor shares power with six elected executive officials ("the cabinet"), proposals to streamline the system are extremely controversial.[43]

The Veto Power

In 1776, the exercise of a veto by the executive was generally thought to be "aristocratic," and too much like the exercise of the veto by the royal colonial governors. That view began to change, however, as it was recognized that there needed to be some executive check on legislative power. Now, the governors of all states except North Carolina have the power to veto enactments of the legislature.

The gubernatorial "negative voice" in legislation, however, was basically an "all-or-nothing" power. The veto power was, therefore, even more broadly expanded with the advent, around the turn of the century, of the item veto over specific line items in appropriations bills.[44] Some states go beyond the item veto and permit governors to reduce such line items without vetoing them.[45] President Ronald Reagan suggested that the President be authorized to exercise an item veto similar to that of governors;[46] thus, the item veto has become a subject of national debate.[47] Gubernatorial exercise of the item veto, originally intended to prevent legislative "logrolling," presents a range of complex issues. For example, what constitutes an "item" in an appropriations bill? May a governor veto language or restrictions without vetoing the appropriation itself? What constitutes an appropriations bill? These and other related questions have resulted in a relatively large volume of recent litigation.[48]

Executive Orders

A recent series of cases concerning ethics and conflicts of interest addressed the extent of gubernatorial authority to make policy through executive orders. Several governors promulgated financial disclosure requirements and conflict-of-interest guidelines by executive order which, in the absence of clear legislative authority, were challenged as being beyond the executive power. In the leading case, *Rapp* v. *Carey*,[49] the New York Court of Appeals invalidated the executive order:

> The crux of the case is the principle that the Governor has only those *powers* delegated to him by the constitution and the statutes. . . . Under our system of distribution of power with checks and balances, the purposes of the executive order, however desirable, may be achieved only through proper means.

Based on the proposition that the executive branch may exercise only those *powers* delegated to it by the constitution or statute, the question of implied powers is often crucial. This consideration may be contrasted with the importance of implied *limitations* on the legislative branch.

The State Judicial Branch

State constitutions govern the judicial branch in many respects. They have been the vehicles for streamlining and unifying state court systems. State constitutions usually set forth in some detail the jurisdiction of most state courts. Finally, the method of selection and tenure of state judges is controlled by the state contstitution.

State supreme courts serve a number of important functions within state government and the legal system. Most familiar is their role in common law development and statutory and constitutional interpretation, functions performed in the context of adjudicating cases. Interestingly, state supreme courts developed the concept of judicial review of the constitutionality of statutes well before *Marbury* v. *Madison*.[50] Most studies of state courts focus on their adjudicatory function in deciding cases. A major focus of the study of state constitutional law, however, should be on the nonadjudicatory functions (outside the decision of cases) of state supreme courts.

Rules of Practice and Procedure

Supreme courts in many states have constitutional authority to promulgate rules of practice and procedure for the courts. Although this power is explicitly granted now in many constitutions, earlier commentators regarded it as an inherent judicial power.[51] Exercise of the rulemaking power reaches such crucial areas of lawyers' work as discovery and class actions. This grant of power to the courts serves as a limitation on legislative authority. Therefore, statutes that invade the procedural realm may be invalidated by the courts.

The relationship between statutes and court rules varies from state to state, but common issues arise. For example, in the famous case of *Winberry* v.

Salisbury,[52] the New Jersey Supreme Court held that the New Jersey Constitution[53] prohibits the legislature from statutorily overriding court rules. Other states resolve this issue by reference to the specific constitutional language involved. For example, Florida's constitution provides: "These rules may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature."[54]

The distinction between practice and procedure is easier to define than to apply. For example, does the following formulation apply to the law of evidence? "[S]ubstantive law creates, defines, adopts and regulates rights, while procedural law prescribes the method of enforcing those rights."[55] When the Florida legislature passed a comprehensive statutory evidence code, the Florida Supreme Court resolved the potential conflict by adopting the evidence code as a court rule.[56] The Colorado Supreme Court avoided a possible conflict between its rulemaking authority and a rape shield statute by holding that the statute would stand because there was no conflicting court rule on the subject.[57] Taking a different view of its relationship to the legislature, the New Jersey Supreme Court has intimated that because it can make substantive law in common law adjudications there is no need for the court to limit itself strictly to practice and procedure in its rulemaking capacity.[58]

Regulation of the Practice of Law

Another power initially claimed to be inherent in the judiciary relates to the admission and discipline of attorneys.[59] Many state constitutions now expressly confer this power on the courts and, again, as a grant of judicial authority, this power serves as a limitation on the legislature. Surprisingly, to many people, state legislatures may not pass statutes concerning the admission and discipline of lawyers. A recent series of cases in Pennsylvania held that the state ethics act could not be applied to lawyers.[60] "Sunset" legislation applying to statutes regulating professions may not apply to the practice of law.

Through the exercise of their power to regulate the bar, courts have promulgated the modern student practice rules that form the basis for clinical legal education.[61] The New Jersey Supreme Court utilized the power to place limits on attorneys' fees for tort cases,[62] and most courts are now grappling with lawyer advertising and specialization. The Florida Supreme Court, now followed by many others, used the power to regulate the practice of law to initiate an innovative program that permits lawyers to place funds entrusted to them in interest-bearing accounts and to use the revenues for various public service projects.[63]

Inherent Powers of the Courts

In recent years, particularly with respect to budgetary matters, state courts have been asserting that:

> . . . the Judiciary *must possess* the inherent power to determine and compel payment of those sums of money which are reasonable' and necessary to carry out its mandated responsibilities, and its powers and duties to administer Justice, if it is to be in reality a co-equal, independent Branch of our Government.[64]

This claim of inherent powers raises important questions of political theory. However, the issue of whether the branches of state government exercise delegated or inherent powers is largely academic. Because state constitutions provide that all legislative power resides in the legislature, the important task is to define the legislative power, not to quibble over whether that power is inherent or delegated. State constitutions similarly place the judicial power in the judiciary; consequently, rather than debating whether a court's power is inherent, the inquiry should focus on whether the claimed power is properly and necessarily a judicial function.

Advisory Opinions

Eleven state constitutions authorize or require state supreme courts to render advisory opinions to various governmental officials.[65] States differ, of course, as to which officers may request opinions and when they may do so. The courts tend to construe strictly their authority and obligations under these provisions.[66] Interesting questions may arise as to the precedential value of advisory opinions. After all, advisory opinions are not adjudications of actual controversies, and are not exercises of the traditional "judicial power." According to the Supreme Judicial Court of Massachusetts:

> It has been uniformly and many times held that such opinions, although necessarily the result of judicial examination and deliberation, are advisory in nature, given by the justices as individuals in their capacity as constitutional advisors of the other departments of government and without the aid of arguments, are not adjudications by the court, and do not fall within the doctrine of *stare decisis*.[67]

There seems to be evidence that, in the context of advisory opinions, courts do not accord the same presumption of correctness to the actions of the other branches that they do in adjudicating cases. The advisory opinion can be viewed as an important safety valve standing in the way of unconstitutional actions.

The Position and Function of the State Judiciary in Adjudication

In addition to these nonadjudicatory functions of state supreme courts, the state courts differ significantly from federal courts even with respect to adjudication. The typical state court system occupies a different institutional position and performs a different judicial function from its federal counterpart. The typical state constitution also differs from its federal counterpart in many ways. Consequently, state court judicial review of state statutes or executive actions is, or should be, qualitatively different from the federal court judicial review of the same statutes or actions. First, as noted earlier, beginning soon after independence, the balance of power between state legislatures and judiciaries has been gradually shifting, increasing executive (as discussed earlier) and judicial authority at the expense of legislative authority. In addition, the wide range of detailed restrictions on state governments contained in state constitutions is enforceable by state courts, bringing them into a much more detailed involvement in the workings of the other branches. For all these reasons, state courts are often deeply involved in the state's ongoing policymaking processes (constitutional and nonconstitutional).[68] Although the extent of this involvement may vary from state to state,[69] such judicial involvement nevertheless reflects a very different institutional position from that occupied by the federal courts.

Second, the typical state court's judicial function is different from the federal court's. For example, state courts have traditionally performed much nonconstitutional lawmaking. As Justice Hans A. Linde observed:

> When a state court alters the law of products liability, abolishes sovereign or charitable tort immunity, redefines the insanity defense, or restricts the range of self-exculpation in contracts of adhesion, its action is rarely attacked as "undemocratic." Nor is this judicial role peculiar to matters of common law subject to legislative reversal. The accepted dominance of courts in state law extends to their "antimajoritarian" role in review of their coordinate political branches in state and local governments.[70]

Federal courts, although they certainly have far-reaching powers to enforce federal law, have been denied this general lawmaking power since 1938, when, in *Erie Railroad* v. *Tompkins*,[71] the U.S. Supreme Court declared that *federal* courts do not have the power to make common law decisions binding on states.

As discussed earlier, most state supreme courts promulgate law through rulemaking powers. They also exercise various "inherent powers," usually at the expense of the legislative branch. Once thought to be legislative in nature, these powers have devolved on state judiciaries during this century.

Many state supreme courts do not face the same overwhelming caseload pressures and jurisdictional restrictions as does the U.S. Supreme Court. Some state courts even have "reach down" provisions[72] that enable them to obtain jurisdiction quickly over state constitutional conflicts requiring early resolution. Therefore, state courts are able to approach state constitutional analysis on a narrower, more incremental basis than the U.S. Supreme Court, which labors under intense pressure for broader, more sweeping pronouncements.

Finally, state courts may be viewed as closer to state affairs and as arguably more accountable to state citizens than federal courts. Many state constitutions provide for an elected judiciary, or periodic review of appointed judges. Standing and justiciability barriers are usually lower in the state courts. Furthermore, in certain areas, such as criminal procedure, state trial judges are more experienced than federal judges in the problems of administering U.S. Supreme Court formulations on a daily basis. Many state judges now view their roles as sometimes requiring controversial constitutional rulings.

Judicial Review

By contrast to the federal Constitution, the text of a state constitution may provide explicitly for state judicial review of legislative and executive action. For example, Article I, Section 2, paragraph 5 of the Georgia Constitution provides: "Legislative Acts in violation of this Constitution or the Constitution of the United States are void, and the judiciary shall so declare them." The North Dakota Constitution, however, imposes a voting rule on judicial review: "The supreme court shall not declare a legislative enactment unconstitutional unless at least four of the [five] members of the court so decide" (Article VI, Section 4).

Contrary to the federal experience, most judiciary provisions of state constitutions have been revised and ratified in this century without a serious struggle over the exercise of judicial review. As indicated earlier, judicial review existed in the states prior to the federal Constitution and the landmark *Marbury* v. *Madison* decision in 1803, in which Chief Justice John Marshall established the doctrine of judicial review for the U.S. Supreme Court. The fact that state constitutions are so much more easily amended than is the federal Constitution has led to at least some support for an increased level of judicial scrutiny of statutes because "mistakes" can be more easily corrected by the electorate.[73]

Local Government and State Constitutions

Local governments have a very wide range of powers and responsibilities in the American governmental system. Actually, the existence of local governments predates national independence and the formation of the states. It is surprising, therefore, to note that the first state constitutions were virtually silent on the question of local governments and their powers. As one commentator noted, the early state constitutions did not separate, "powers vertically (state-local) as well as horizontally (executive-legislative-judicial)."[74] This absence of "constitutional legitimacy"[75] for local governments caused a number of problems in developing legal and political justifications for their ongoing existence and exercise of powers. These justifications varied, until finally, by the 1860s, the famous "Dillon's Rule" of local government subordination to the state legislature gained acceptance:

> Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control.[76]

This dependent status of local governments, particularly of large cities, became more and more unsatisfactory as cities and their problems grew, while rural-dominated state legislatures tended to give insufficient attention to urban problems. Local leaders began to argue for their own powers, which they could utilize to address local problems without constantly seeking authority from a sometimes distant and unconcerned state legislature. These local concerns led to the home rule movement, a major component of which involved state constitutional amendments granting semi-autonomous powers to local governments.[77] The forms of these amendments have followed several different models, have evolved over time,[78] and have generated much litigation over the question of whether an area of concern can be dealt with by local government rather than by the state legislature.[79] For example, the well-known Village of Morton Grove gun control case in Illinois turned on, among other things, the home rule power to regulate firearms.[80]

In addition to home rule, many other areas of local government are directly affected by state constitutions. Taxation and finance, for example, including the tax limitation movement of the 1970s, are treated in detail in state constitutions.[81] The recent movement to require state funding to enable local governments to carry out state-imposed "mandates" has resulted in constitutional amendments in seven states (and statutory provisions in seven other states) requiring such legislative funding, although those rules are not always effective.[82] Finally, there appears to be a significant trend in the judicial interpretation of state constitutions that recognizes "localism" as a state constitutional value, at least in litigation over exclusionary zoning and school finance.[83]

Conclusion

The evolution of the treatment of government structure in state constitutions reflects, to a great extent, the progressing understanding of American government. As citizens came to understand the need for expanded executive power and the dangers of unfettered legislative authority, the legislative-executive balance was adjusted. As the need for judicial independence, court unification, and additional, intermediate courts was felt, state constitutions were amended to accommodate these needs. Calls by local government leaders for increased powers were, albeit slowly, recognized by constitutional home rule provisions.

The picture of state constitutions as governmental straitjackets, or inhibitors of change, has been changing. There has been movement toward what Daniel J. Elazar calls the "managerial pattern" of state constitutions, characterized by "conciseness, broad grants of powers to the state executive branch, and relatively few structural restrictions on the legislature."[84]

Still, however, state constitutions contain many costly restrictions on the way state and local governments operate, if not on how they are structured. This is particularly true in the area of taxation and finance. It must be remembered, in the words of Frank P. Grad:

> The least we may demand of our state constitutions is that they interpose no obstacle to the necessary exercise of state powers in response to state residents' real needs and active demands for service.[85]

NOTES

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[1] Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* (Chapel Hill: University of North Carolina Press, 1980), pp. 55-56.

[2] William M. Wiecek, *The Guarantee Clause of the United States Constitution* (Ithaca: Cornell University Press, 1972).

[3] Pacific States Telephone and Telegraph Co. v. Oregon, 223 U.S. 118 (1912).

[4] See Coyle v. Smith, 221 U.S. 559 (1911). See also Peter S. Onuf, "New State Equality: The Ambiguous History of a Constitutional Principle," *Publius: The Journal of Federalism* 16 (Fall 1986): 53-69.

[5] Prentice v. Atlantic Coast Line Railroad, 211 U.S. 210, 255 (1908).

[6] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[7] Truax v. Corrigan, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting)

[8] *Pennsylvania Packet*, December, 1778, *The Complete Writings of Thomas Paine*, ed. Philip S. Foner, 2 Vols. (New York: Citadel Press, 1969), 2:281.

[9] See L. Harold Levinson, "The Decline of the Legislative Veto: Federal/State Comparisons and Interactions," *Publius: The Journal of Federalism* 17 (Winter 1987): 115.

[10] Frank P. Grad, "The State Constitution: It's Function and Form in Our Time," *Virginia Law Review* 54 (June 1968): 941.

[11] State ex rel. Schneider v. Kennedy, 225 Kan. 13, 587 P 2nd 844, 850. (1978)

[12] The Italia Shipping Corp. v. Nelson, 323 Ill. 427, 439 (1926).

[13] Robert F. Williams, "Evolving State Legislative and Executive Power in the Founding Decade," *Annals of the American Academy of Political and Social Science* 496 (March 1988): 43. See also John V. Orth, "Separate and Distinct: Separation of Powers in North Carolina," *North Carolina Law Review* 62 (October, 1983): 1.

[14] Askew v. Cross Key Waterways, 372 So. 2d 913, 924 (Fla. 1978); Robert W. Martin Jr., "Legislative Delegations of Power and Judicial Review—Preventing Judicial Impotence," *Florida State University Law Review* 8 (Winter 1980): 51.

[15] New Jersey Constitution. Article III, Section 1.

[16] Brown v. Heymann, 297 A 2d 572, 576-77 (NJ, 1972); Martin, "Legislative Delegations," p. 51 n. 41.

[17] Frank E. Cooper, *State Administrative Law*, 2 vols. (Indianapolis: Bobbs-Merrill, 1965), 1:31.

[18] Reynolds v. Sims, 377 U.S. 533, 564 (1964).

[19] Client Follow-Up Co. v. Hynes, 390 N.E. 2d 847, 849 (Ill. 1979).

[20] Amasa M. Eaton, "Recent State Constitutions," *Harvard Law Review* 6 (October 1892): 109.

[21] Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1969), p. 452.

[22] See also Rodney O. Davis, "The People in Miniature': The Illinois General Assembly, 1818-1848," *Illinois Historical Journal* 81 (Summer 1988): 95-108.

[23] Wood, *Creation of the American Republic*, p. 62.

[24] Peter S. Onuf, "State Politics and Ideological Transformation: Gordon S. Wood's Republican Revolution," *William and Mary Quarterly*, 3rd ser. 44 (July 1987): 614.

[25] Wood, *Creation of the American Republic*, p 409.

[26] Grad, "The State Constitution," 964-966.

[27] For a case avoiding this negative implication problem, see Eberle v. Nielson, 78 Idaho 572, 306 P.2d 1083 (1957).

[28] Millard H. Ruud, "No Law Shall Embrace More than One Subject," *Minnesota Law Review* 42 (January 1958): 389.

[29] See, e.g., Pennsylvania Constitution, Article III, Section 2.

[30] See, e.g., Ohio Constitution, Article II, Section 9.

[31] See, e.g., Pennsylvania Constitution, Article III, Section 1.

[32] See, e.g., Florida Constitution, Article III, Section 12.

[33] Grad, "The State Constitution," p. 955 n. 92.

[34] Ibid., pp. 961-62.

[35] Ibid., p. 963.

[36] Ruud, "No Law Shall Embrace," p. 447.

[37] Robert F. Williams, "State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement," *Publius: The Journal of Federalism* 17 (Winter 1987): 91.

[38] David Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* (Baltimore: John Hopkins University Press, 1984), pp. 38-40.

[39] George Lefcoe and Barney Allison, "The Legal Aspects of Proposition 13: The Amador Valley Case," *Southern California Law Review* 53 (November 1979): 172.

[40] See Richard Briffault, "Distrust of Democracy," *Texas Law Review* 63 (March/April 1985): 1347 (reviewing Magleby, *Direct Legislation*).

[41] "The Americans, in short, made of the gubernatorial magistrate a new kind of creature, a very pale reflection indeed of his regal ancestor. This change in the governor's position meant the effectual elimination of the magistracy's major responsibility for ruling the society—a remarkable and abrupt departure from the English constitutional tradition." Wood, *Creation of the American Republic*, p. 136. See also pp. 132-43.

[42] Whitehead v. Rogers, 223 So2d 330 (Fla. 1969). Compare Burns v.Butscher, 187 So. 2d 594 (Fla. 1966) with District School Board v. Askew, 278 So. 2d 272, 275 (Fla. 1973) ("constitutional officers").

[43] See Jon C. Moyle, "Why We Should Abolish Florida's Elected Cabinet," *Florida State University Law Review* 6 (Summer 1978): 591; Malcolm B. Johnson, "Why We Should Keep Florida's Elected Cabinet," p. 603.

[44] See generally Ada E. Bechman, "The Item Veto Power of the Executive," *Temple Law Quarterly* 31 (Fall 1957): 27; Arthur J. Harrington, "The Propriety of the Negative—The Governor's Partial Veto Authority," *Marquette Law Review* 60 (Spring 1977): 865.

[45] Interestingly, this notion of gubernatorial reduction of appropriation items, as opposed to absolute veto, seems to stem from Pennsylvania's judicial interpretation in Commonwealth v. Barnett, 199 Pa. 161, 48 A 976 (1901) of its provision to permit such reductions. Virtually all other courts that have considered the issue have rejected this interpretation. See. e.g., Wood v. State Administration Board 255 Mich. 220 238 N.W. 16 (1931); Mills v. Porter, 69 Mont. 325, 222 P 428 (1924). A number of states, however, have amended their constitutions to authorize gubernatorial reduction. See generally Note, "Item Veto, Reduction of Items, Elimination of Items Included in a General Sum," *Southern California Law Review* 12 (March 1939): 321.

[46] *NewYork Times*, October 25, 1981. Not surprisingly, this suggestion came from a former governor of California, a state where governors may reduce items. The idea is not new. See for example, Note, "Separation of Powers: Congressional Riders and the Veto Power," *University of Michigan Journal of Law Reform* 6 (No. 3 1973): 735.

[47] Louis Fisher and Neal Devins, "How Successfully Can the States' Item Veto Be Transferred to the President?" *Georgetown Law Journal* 75 (October 1986): 159. See also House Committee on Rules, *Item Veto: State Experience and its Application to the Federal Situation*, 99th Congress, 2nd Session (Committee Print 1986), and U.S. Advisory Commission on Intergovernmental Relations, *Fiscal Discipline in the Federal System: National Reform and the Experience of the States* (Washington, DC: ACIR, 1987).

[48] See, for example, Brown v. Firestone, 382 So. 2d 654 (Fla. 1980); State ex rel Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974); Karcher v. Kean, 97 N.J. 483, 479 A.2d 403 (1984); State ex rel. Kleczka v. Conta, 82 W.S. 2d 679, 364 N.W. 2d 539 (1978).

[49] 44 N.Y. 2d at 166-67, 375 N.E. 2d at 750-51, 404 N.Y.S.2d at 570. See also Buettell v. Walker, 59 Ill 2d 146, 319 N.E. 2d 502 (1974) (purpose of executive order appears to be to formulate a new legal requirement rather than to execute an existing one); Shapp v. Butera, 22 Pa. Commw. 229 348 A.2d 910 (1975) (governor has only those powers delegated by constitution or statute, or which may be implied from the nature of the duties imposed on him.) See generally Martin v. Chandler, 318 S.W. 2d 40 (Ky. 1958); Opinion of the Justices, 118 N.H. 582, 392 A.2d 125 (1978); Richard E. Faboriti, "Executive Power under the New Illinois Constitution: Field Revisited," *John Marshall Journal of Practice and Procedure* 6 (Spring 1973): 235; Note, "Gubernatorial Executive Orders as Devices for Administrative Discretion and Control," *Iowa Law Review* 50 (Fall 1964): 78.

[50] Edward S. Corwin, "The Progress of Constitutional Theory between the Declaration of Independence and the Meeting of the Philadelphia Convention," *American Historical Review* 30 (April 1925): 521; William E. Nelson, "The Eighteenth Century Background of John Marshall's Constitutional Jurisprudence," *Michigan Law Review* 76 (May 1978): 893.

[51] See Roscoe Pound, "The Rulemaking Power of the Courts," *American Bar Association Journal* 12 (September 1926): 599; John Henry Wigmore, "All Legislative Rules for Judiciary Procedure are Void Constitutionally," *Illinois Law Review* 23 (November 1928): 276.

[52] 5 N.J. 240, 74 A.2d 406 (1950).

[53] The New Jersey Constitution provides: "The Supreme Court shall make rules governing the administration of all courts in the State and *subject to law*, the practice and procedure in all such courts." New Jersey Constitution, Article 6, Section 2, paragraph 3 (emphasis added).

[54] Florida Constitution, Article 5, Section 2(a). Issues for judicial interpretation still remain. See, e.g., Carter v. Sparkman, 335 So. 2d 802, 808 (Fla. 1976), cert. denied, 429 U.S. 1041 (1977) (repeal by implication not permitted): In re Clarification of Florida Rules of Practice and Procedure, 281 So. 2d 204 (Fla. 1973) (legislature may repeal but not amend rules).

[55] In re Florida Rules of Criminal Procedure, 272 So. 2d 65 (Fla. 1973).

[56] See in re Florida Evidence Code, 376 So. 2d 1161 (Fla. 1979); In re Florida Evidence Code, 372 So. 2d 1369 (Fla. 1979).

[57] People v. McKenna, 196 Colo. 367, 585 P. 275 (1978). See also Knight v. City of Margate, 86 NJ 374, 386-98, 431 A2d 833, 839-45 (1981) (distinguishing the existence of judicial rulemaking power from its exercise).

[58] Busik v. Levine, 63 NJ 351, 307 A.2d 571 (1973).

> The constitutional grant of rulemaking power as to practice and procedure is simply a grant of power; it would be a mistake to find in that grant restrictions upon judicial techniques for the exercise of that power, and still a larger mistake to suppose that the grant of that power impliedly deprives the judiciary of flexibility in the area called "substantive" law.
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> Id. at 363, 307, A.2d at 577.

The difference, of course, between the two "techniques" of exercising judicial power was that the New Jersey Supreme Court had held that the legislature could not overrule court rules, although the legislature could overrule substantive law decisions.

[59] See Petition of the Florida State Bar Ass'n, 40 S. 2d 902, 905-06 (Fla. 1949) and cases cited therein. See also Board of Overseers of the Bar v. Lee, 422 A.2d 998, 1002 (Me. 1980).

[60] See Wajert v. State Ethics Commission, 491 Pa. 255, 420 A.2d 439 (1980); Ballou v. State Ethics Commission, 56 Pa. Commw. 240, 424 A.2d 983 (1981); Kremer v. State Ethics Commission, 56 Pa. Commw. 160, 424 A.2d 968 (1981) (judges). Contra Knight v. City of Margate, 86 N.J. 374, 431 A.2d 833 (1981). See generally Joseph D. Robertson and John W. Buehler, "The Separation of Powers and the Regulation of the Practice of Law in Oregon," *Willamette Law Journal* 13 (No. 2 1977): 273.

[61] See for example, Art XVIII, Integration Rule of the Florida Bar, as amended, cited in Attorney General and Others to Amend Article XVIII of the Integration Rule of the Florida Bar, 339 So. 2d 646 (Fla. 1976).

[62] See American Trial Lawyers Association v. New Jersey Supreme Court, 66 N.J. 258, 330 A.2d 350 (1974).

[63] See generally In re Interest on Trust Accounts, 402 So. 2d 389 (Fla. 1981). The program is discussed in Comment, "A Source of Revenue for the Improvement of Legal Services, Part I," *St. Mary's Law Journal* 10 (No. 3 1978): 539; "Part II," *St. Mary's Law Journal* 11 (No. 1 1979): 113.

[64] Commonwealth ex rel Caroll v. Tate, 442 Pa. 45, 52, 274 A.2d 193, 197 (1971). See also Comment, "State Court Assertion of Power to Determine and Demand Its Own Budget," *University of Pennsylvania Law Review* 120 (June 1972): 1187. For a more recent example of the Pennsylvania Court's thinking, see Beckert v. Warren, 439 A.2d 638 (Pa. 1981). See generally Geoffrey C. Hazard, Jr., Martin B. McNamara and Irwin F. Sentilles, III, "Court Finance and Unitary Budgeting," *Yale Law Journal* 81 (June 1972): 1286; Note, "Judicial Financial Autonomy and Inherent Power," *Cornell Law Review* 57 (July 1972): 975.

[65] See generally Comment, "The State Advisory Opinion in Perspective," *Fordham Law Review* 44 (October 1975): 81.

[66] See In re House Resolution No 12, 88 Colo. 569, 298 (1931; In re Opinion of the Justices, 314 Mass. 767. 49 N.E. 2d 252 (1943).

[67] Commonwealth v. Welosky, 276 Mass. 398, 400, 177 N.E.656, 658 (1931). The court continued:

> When the same questions are raised in litigation, the justices then composing the court are bound sedulously to guard against any influence flowing from the previous consideration, to examine the subject anew in the light of arguments presented by parties without reliance upon the views theretofore expressed, and to give the case the most painstaking and impartial study and determination that an adequate appreciation of judicial duty can impel.

The New Hampshire Supreme Court "caution[ed] that the opinion is not a judicial decision. . . ." In re Opinion of the Justices, 82 N.H. 561, 575, 138 A. 284, 291 (1927). The Florida Constitution provides for "interested persons to be heard on the questions presented." Florida Constitution, Art. IV, Section 1(c).

[68] Henry Robert Glick, *Supreme Courts in State Politics* (New York: Basic Books, 1971), p. 5: "State supreme courts are not simply duplications of the national court at a lower level of the judicial hierarchy. Instead, they are distinctive institutions which are integral parts of state political and legal systems." See also Herbert Jacob and

Kenneth N. Vines, *Politics in the American States: A Comparative Analysis*, 3d ed. (Boston: Little Brown and Co., 1976), p. 246: "I[t] becomes apparent that the state courts make significant policies in many of the same substantive areas in the other organs of government."

[69] Glick, *Supreme Courts*, p. 151; Henry Robert Glick and Kenneth N. Vines, *State Court Systems* (1973). See generally, G. Alan Tarr and Mary Cornelia Porter, *State Supreme Courts in State and Nation* (New Haven: Yale University Press, 1988).

[70] Hans A. Linde, "Judges, Critics, and the Realist Tradition," *Yale Law Journal* 82 (1972): 248. See also Lawrence Baum and Bradley C. Canon, "State Supreme Courts as Activists: New Doctrines in the Law of Torts," in Mary Cornelia Porter and G. Alan Tarr, *State Supreme Courts: Policymakers in the Federal System* (Westport, Connecticut: Greenwood Press, 1982), p.83. The "legitimacy" of such common-law decisions is sometimes attacked as invading the province of the legislature. See generally Ralph F. Bischoff, "The Dynamics of Tort Law: Court or Legislature?" *Vermont Law Review* 4 (Spring 1979): 35. State supreme courts also pursue policy initiatives outside their formal judicial role in the adversary process, including direct and indirect contact with legislators. See Henry Robert Glick, "Policy-Making and State Supreme Courts: The Judiciary as an Interest Group," *Law and Society Review* 5 (November 1970): 271.

[71] 304 U.S. 64 (1938).

[72] See, for example, Arthur J. England, Jr., Eleanor Mitchell Hunter, and Richard C. Williams, Jr., "Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform," *University of Florida Law Review* 32 (Winter 1980): 193-96; Arthur J. England, Jr. and Richard C. Williams, "Florida Appellate Reform One Year Later," *Florida State University Law Review* 9 (Spring 1981): 250-53.

[73] Commonwealth v. O'Neal, 369 Mass. 242, 275, 339 N.E.2d 676, 694 (1975). For the contrary view, see State v. Baker, 81 N.J. 99, 115-26, 405 A.2d 368, 375-81 (1979).

[74] James E. Herget, "The Missing Power of Local Government: A Divergence between Text and Practice in Our Early State Constitutions," *Virginia Law Review* 62 (June 1976): 1001.

[75] Ibid.

[76] Clinton v. Cedar Rapids and Missouri River Railroad, 24 Iowa 455 (1868), quoted in Michael E. Libonati, "Intergovernmental Relations in State Constitutional Law: A Historical Overview," *Annals of the American Academy of Political and Social Science* 496 (March 1988): 113.

[77] Jefferson B. Fordham, "Foreword: Local Government in the Larger Scheme of Things," *Vanderbilt Law Review* 8 (June 1955): 668-71.

[78] Kenneth Vanlandingham, "Constitutional Municipal Home Rule since the AMA (NLC) Model," *William and Mary Law Review* 17 (Fall 1975): 1.

[79] See, for example, City of Miami Beach v. Fleetwood Hotel, Inc., 261 So. 2d 801 (Fla. 1972) (rent control); City of Miami Beach v. Forte Towers, Inc., 305 So. 2d 764 (Fla. 1974) (same).

[80] Kalodimos v. Village of Morton Grove, 103 Ill. 2d 483, 474 N.E. 2d 266 (1984).

[81] David M. Rosenberger, "Historical Perspective on Constitutional Limitation of Property Taxes in Michigan," *Wayne Law Review* 24 (March 1978): 939; M. David Gelfand, "Seeking Local Government Fiscal Integrity through Debt Ceilings, Tax Limitations, and Expenditure Limits: The New York Fiscal Crisis, the Taxpayers' Revolt, and Beyond," *Minnesota Law Review* 63 (1979): 545.

[82] U.S. General Accounting Office, *Legislative Mandates: State Experiences Offer Insights for Federal Action* (Washington, DC: GAO, September 1988); Libonati, "Intergovernmental Relations," p. 116; Durant v. State Board of Education, 424 Mich. 364, 381 N.W. 2d 622 (1985); Boone County Court v. State, 631 S.W. 2d 321 (Mo. 1982).

[83] Richard Briffault, "Localism in State Constitutional Law," *Annals of the American Academy of Political and Social Science* 496 (March 1988): 117.

[84] Daniel J. Elazar, "The Principles and Traditions Underlying State Constitutions," *Publius: The Journal of Federalism* 12 (Winter 1982): 22.

[85] Grad, "The State Constitution," p. 939.

Chapter 4

The States and Civil Liberties

Most Americans today view the protection of civil liberties primarily as the responsibility of the U.S. Supreme Court, and they look to its rulings interpreting the federal Bill of Rights and the Fourteenth Amendment to discover the scope of individual rights. Yet this identification of civil liberties with the federal Constitution and the U.S. Supreme Court is a relatively recent development in American history. For most of the nation's history, the federal Bill of Rights was understood to protect solely against federal infringements on rights.[1] State law—as found in state bills of rights, state statutes, and the common law—served as the primary guarantor of individual liberties.

The dramatic shift in the relative roles played by state law and federal law in protecting rights began in the early 20th century. In 1925 the U.S. Supreme Court ruled that the First Amendment's ban on abridgements of freedom of speech by the federal government is applicable to the states by the due process clause of the Fourteenth Amendment.[2] Over the next 50 years, the Supreme Court continued its gradual process of selectively extending federal constitutional protection on a case-by-case basis against state violations of various other guarantees of the U.S. Bill of Rights.[3] During the 1960s, this process, usually referred to as "selective incorporation," accelerated significantly, as the Supreme Court incorporated most of the Bill of Rights' criminal justice guarantees.[4]

Selective incorporation influenced both the forums in which civil liberties claims were advanced and the forms that those claims took. By ruling that the federal Constitution prohibited state violations of rights, the Supreme Court multiplied its opportunities to address civil liberties issues. At the same time, the perception that federal forums were more sympathetic to rights claimants—a perception that oftentimes was quite accurate—diverted cases from state courts, thereby retarding the development of a state constitutional jurisprudence. Even when civil liberties issues arose in state tribunals, attorneys typically ignored state bills of rights or treated state and federal provisions as interchangeable, relying on the U.S. Supreme Court for doctrine and legal precedent. The predictable result was the domination of civil liberties law by the federal judiciary.

Early in the 1970s, this domination was challenged by a few state courts that began to rely on state bills of rights to resolve civil liberties issues.[5] Since then, this development, known as the "new judicial federalism," has become a nationwide phenomenon.[6] State judges from all sections of the country have reported significant increases in litigation under state bills of rights.[7] Scholars have identified some 400 cases since 1970 in which state high courts have either granted greater rights protection under their state constitutions than was granted by the U.S. Supreme Court under the federal Constitution or have based their decisions affirming rights solely on their state constitutions.[8]

The emergence of the new judicial federalism raises anew the question of what part state law can and should play in delineating and protecting rights. To answer this question, we review in this chapter the debate over the role to be assigned to state law in protecting civil liberties. Next, to assess the contribution of state law in protecting rights, we consider how state law has dealt with selected aspects of the freedoms of speech, press, and religion. Clearly, no set of three issues can be fully representative. However, because the rights at stake in these three areas are so fundamental, our survey of state efforts to protect them furnishes some indication of the role currently played by state civil liberties law.[9] Equally important, our analysis of these issues illustrates the opportunities that the states have to contribute to the protection of civil liberties, the array of legal weapons at their disposal for this purpose, and the use that the states have made of these weapons.

A State Civil Liberties Law?

The basic question to be addressed is whether the states should play any part in defining and protecting rights. Opponents of state involvement have insisted that the protection of rights is properly a federal responsibility because all Americans should enjoy the same rights, rather than having their rights determined by accidents of geography (i.e., by where they live). In addition, they have suggested, whatever the theoretical arguments in favor of state involvement, the unhappy record of the states throughout American history in failing to safeguard rights justifies lodging this responsibility in the federal government.

Undeniably, these arguments for an interstate uniformity of rights and for the protection of those rights by the national government have considerable force. However, they are hardly the whole story. There are important reasons rooted in American constitutional history and constitutional theory, as well as in the nature of American federalism, for state participation in defining and protecting rights.

Before elaborating those reasons, however, one might note the implications of the argument for an interstate uniformity in rights. That argument, if generalized, would justify the elimination of virtually all policymaking by the states. For if one's rights should not depend on "accidents of geography," neither presumably should the availability of any other important benefit or service provided by government. However, Americans have long accepted some state autonomy and a degree of diversity in the provision of benefits and services because we believe that, on balance, the system of federalism that permits such autonomy and diversity is a good system.[10] This, of course, hardly proves that there should be interstate differences in rights. Although we welcome diversity in some matters, in others we have opted for national uniformity. Nonetheless, it does suggest that the mere fact of interstate diversity is not, in and of itself, a sufficient argument against participation in protecting rights.

The broader argument in favor of state participation in defining and protecting rights begins with the recognition that such involvement is no innovation but rather an established feature of American constitutionalism.[11] Even before the adoption of the federal Constitution, several states had assumed this responsibility by prefacing their constitutions with bills of rights. Other states inserted protections for rights in the body of their charters. As initially proposed, the federal Constitution largely left the task of protecting rights in state hands, since it did not include a bill of rights. Even when Antifederalist complaints led to the addition of a bill of rights, the First Congress made clear that *state* declarations of rights could and should continue to provide protection by rejecting a proposal that guaranteed various rights against state infringement. Since then, all 50 states have included bills of rights in their constitutions and also have acted to secure rights through statutes and judicial rulings. Although the Fourteenth Amendment to the U.S. Constitution was designed to augment federal power to prevent state violations of rights, the amendment was meant to supplement, rather than to preempt, state protections. Thus, as a matter of constitutional design, the states have from the outset been encouraged to participate in defining and securing rights, and throughout the nation's history they have done so.

Yet in encouraging the states to define and protect rights, the nation almost inevitably committed itself to an interstate diversity in rights. Even at the time the federal Constitution was adopted, there were important differences in the rights enjoying constitutional protection in the various states.[12] Although one might have expected the adoption of the federal Bill of Rights to promote interstate uniformity by providing a model for emulation, in fact this has not occurred. In some instances, the states have looked to the federal Constitution for direction: for example, 33 states have adopted constitutional provisions that parallel the Second Amendment by tying the right to bear arms to the need for a "well-regulated militia."[13] But more frequently the states have looked to their sister states rather than to the national government for guidance: 30 states, for example, have modeled constitutional protections on the Virginia Constitution's declaration that "all men are born equally free and independent."[14] Moreover, whereas the federal Constitution has been amended only infrequently to secure rights beyond those contained in the Bill of Rights, the states have not hesitated to amend their constitutions to recognize new rights or to extend protection against new threats to rights. Between 1968 and 1976, for example, 16 states adopted constitutional guarantees of gender equality.[15] Finally, as Table 1 demonstrates, several states have adopted protections for rights that lack any analogue in the U.S. Constitution.

Table 1
Examples of Distinctive State Constitutional Protections

Right	States
The right to privacy	10 states: 8 as part of protection against unreasonable search and seizure 2 as free-standing protections
A right to pure water	Pennsylvania
Bans or limits on imprisonment for debt	39 states
The right to a legal remedy for injury	36 states
The right to safe schools	California
Prohibition against undue harshness	7 states
The right to fish	California, Rhode Island
Prohibition against sex discrimination	19 states

The diversity of rights protected by the various states and the addition of new protections by constitutional amendment suggest that the states have often been responsive to their citizens' demands for the protection of rights not secured by the federal Constitution. In addition, the states' inventiveness in discovering rights, as well as the willingness of states to seek guidance from their sister states, underlines a major advantage of permitting states to contribute to the definition and protection of rights. Requiring a uniformity in rights from state to state would prevent the states from performing their historic function as incubators of political change. If uniformity is required, it will necessarily mean adherence to the "lowest common denominator" that is acceptable nationally.[16] If, however, each state is permitted to pursue its own course, within the limits imposed by the federal Constitution, then the states' experiments can contribute to our national understanding of rights. Indeed, American history confirms the importance of state leadership in the recognition and protection of rights. See Table 2.

Yet, ultimately, the fear remains that if each state can follow its own path, basic rights might be jeopardized. Admittedly, there is some historical warrant for this concern. But this concern is less justified in the contemporary political and legal context. As noted in chapter 1, judicial decisions, federal legislation, and intrastate political developments have all combined to make state political systems more representative than in the past. Partially as a result of this, instances of blatant suppression of minority rights are rare. The civil liberties agenda in the states instead tends to be rather different. The states today are more likely to be called on to establish the proper balance when rights seem in conflict—for example, when press claims of freedom of access to pretrial proceedings collide with the right to privacy or the right to a fair trial.[17] Or states may be asked to balance the competing claims of equality and local autonomy, as in school finance or zoning litigation.[18] Thus, the civil liberties issues that the states are addressing today seldom involve whether basic rights should be protected. At the same time, the complexity of these new issues underlines the advantage of allowing various political and judicial bodies in a multiplicity of jurisdictions to contribute their thoughts on how these issues should be resolved.

Finally, it should be remembered that the incorporation of various guarantees of the U.S. Bill of Rights and the passage of federal civil liberties legislation have, in effect, established a "floor" of basic rights that cannot be infringed. This has not ended state experimentation, nor was it meant to. However, the existence of this "floor" has had the effect of channeling states' experiments in the direction of expanding and safeguarding, rather than violating, rights. Thus, state involvement in defining and securing rights should not jeopardize fundamental rights.

Table 2

Selected State Initiatives in Protecting Rights

Press Shield Laws: 18 states enacted press shield laws prior to the U.S. Supreme Court's decision in *Branzburg* v. *Hayes* (1972), which rejected claims that the First Amendment protects reporters from having to divulge their sources. After the Supreme Court's decision, another seven states extended protection to reporters.

Right to Counsel: 35 states provided counsel to indigent defendants in felony cases prior to the U.S. Supreme Court imposing the requirement on the states in *Gideon* v. *Wainwright* (1963). The Wisconsin Supreme Court imposed the requirement in *Carpenter* v. *Dane* (1850), over a century before *Gideon*.

Exclusionary Rule: The exclusionary rule bars the use of illegally seized evidence in criminal prosecutions. The Iowa Supreme Court adopted the exclusionary rule in *State* v. *Sheridan* (1903), 11 years before the U.S. Supreme Court in *Weeks* v. *United States* (1914) imposed the rule in federal prosecutions. By the time the U.S. Supreme Court imposed the rule as a requirement in state prosecutions, 23 states had adopted the exclusionary rule as a matter of state law.

Equal Pay Provisions: Equal pay provisions forbid wage discrimination on the basis of sex. Before Congress enacted an equal pay law in 1963, 19 states had enacted similar laws.

Fair Housing Legislation: Fair housing legislation prohibits discrimination on the basis of race in the sale or rental of housing. Before Congress enacted a fair housing law in 1968, 17 states had enacted similar laws.

Freedom of Speech under State Constitutions

Every state bill of rights guarantees the freedoms of speech and of the press.[19] During the 19th century, moreover, state rulings interpreting these provisions provided the main body of judicial doctrine on freedom of expression.[20] However, when the U.S. Supreme Court began to address First Amendment issues during the early 20th century, doctrinal debate on the Court quickly detached itself from the body of state cases, pursuing arguments and directions unanticipated by the state courts. Over time the U.S. Supreme Court developed an impressive body of case law, and its decisions spawned a vast scholarly literature. Thus, in the early 1970s, when state courts began once again to address speech and press questions under their state constitutions, they confronted a well developed and highly sophisticated body of legal doctrine.

In such circumstances, one would expect state courts to rely heavily on federal law and precedent rather than to chart their own independent constitutional course. This has occurred. Yet even where federal law predominates, state law can make important contributions where (1) the national government has left issues to the states for resolution, (2) the national government has failed to provide adequate protection for rights, and/or (3) distinctive state constitutional provisions afford protection beyond that available under the federal Constitution.

Private Abridgements of Free Speech

By its very terms, the First Amendment protects the freedom of speech only against congressional abridgement. As a result of incorporation, the federal Constitution is now understood to prohibit state infringements on First Amendment rights; however, private limitations of expression remain outside its purview.[21] The U.S. Supreme Court has recognized that in certain limited circumstances, namely, when private entities are performing public functions, they too are engaged in "state action" and are thus subject to federal constitutional constraints.[22] Nonetheless, the U.S. Supreme Court has read this "public function" exception narrowly. In particular, it has concluded that although privately owned shopping centers may resemble traditional downtown shopping areas, this does not mean that they are performing a "public function." As a result, shopping center owners do not violate the First Amendment when they restrict or forbid speech on their premises.[23]

The U.S. Supreme Court's rulings, however, are not the final word on the subject. Although the U.S. Constitution does not secure a right to speak on private property, neither does it accord property owners a right to exclude speakers. Rather, it allows the states—through their statutory, constitutional, and common law—to define the scope of property rights and to regulate the use of private property in the public interest.[24] Put differently, the states remain free to balance, as they see fit, the competing claims of speakers seeking access and of property owners seeking to restrict speech on their property.

In striking this balance, the states must determine whether their constitutional protections for free speech are directly applicable to private restrictions on speech. Despite variations, what is striking about state guarantees is that many do not merely echo the First Amendment's ban on governmental infringements on the freedom of speech. The Michigan Constitution, for example, states: "Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press."[25] Whereas, the second clause of this provision, like the First Amendment, bars governmental interference with the freedom of speech, the first does not mention government. Instead, it announces a positive right of free speech, albeit one subject to regulation to prevent abuse. In determining the scope of speech rights under state law, then, the states must consider whether this affirmative right of free speech extends beyond the prohibition of governmental infringements on the right to speak—that is, beyond state action—and requires that speakers be accorded access to private property to convey their messages. In reaching this determination, however, the states must also take account of state constitutional protections for property rights and, more specifically, of constitutional requirements that they neither take nor damage property without compensation.[26]

Within the past decade, several states have addressed directly the issue of speech rights on private property. The seminal case is *Robins* v. *Pruneyard Shopping Center* (1979), in which the California Supreme Court upheld Robins' right to collect signatures in a privately owned shopping center for a petition protesting the United Nations' anti-Zionism resolution.[27] The California high court noted that the federal due process clause does not preclude the states from regulating the uses of private property in the public interest. It also asserted that the affirmative endorsement of freedom of speech in the state constitution signals a strong public interest that can, at least in some circumstances, override the claims of property owners. More specifically, the court observed that Robins' solicitation of signatures for his petition neither interfered with the normal business operations of the mall nor diluted property rights. It concluded therefore that he was entitled to protection under the state constitution.

When the U.S. Supreme Court unanimously upheld the California court's ruling in *Pruneyard*, similar cases were filed in several other states.[28] Because the affirmative recognition of speech rights in state constitutions is accompanied typically by an "abuse" limitation, the courts in these states—like the California court in *Pruneyard*—have had to consider whether speakers had interfered with the legitimate claims of property owners. This necessarily required state judges to develop standards for applying the distinctive state guarantees. Some courts made impressive strides in this endeavor. For example, in overturning the trespass conviction of a member of the United States Labor Party who distributed leaflets on the campus of Princeton University without permission, the New Jersey Supreme Court in *New Jersey* v. *Schmid* (1980) considered carefully both the nature of the private property on which Schmid intruded and the extent to which Schmid's expression interfered with—or, as in this case, promoted—the purposes to which the property was dedicated. Similarly, in upholding an environmental group's right to collect signatures and demonstrate in a shopping mall, the plurality opinion for the Washington Supreme Court noted that the right depended on whether "state law confers such a right and . . . its exercise does not unreasonably interfere with the constitutional rights of the owner."[29]

However, not all state jurists have concluded that their constitutions afford speakers a right to convey their messages on private property. Several of the decisions extending protection against private abridgment of speech have provoked sharp dissents from justices who found a "state action" requirement implicit in the state's bill of rights. Since 1984, courts in Connecticut, Michigan, and New York have all endorsed the dissenters' position.[30] Moreover, even those states that have extended constitutional protection against private restrictions on speech have found it difficult to strike a balance between the rights of speakers and those of property owners.[31]

Yet, the fact that one encounters interstate—and even intrastate—disagreements about the interpretation and application of state constitutional provisions is hardly surprising. Rather, it would be surprising if every state, having recognized that its constitution affords independent protection for rights, interpreted its constitutional guarantees in exactly the same way. Moreover, the diversity of interpretation that results from our system of federalism should be viewed as a strength rather than a weakness. This diversity encourages an interstate dialogue about the scope of individual liberties that can promote thoughtful, informed decisions.[32] As state judges consider in new contexts the meaning of their state's distinctive constitutional guarantees—for example, the "abuse" limitations on the freedom of speech found in several state constitutions—and begin to develop a state jurisprudence of free speech, they will undoubtedly benefit from the exchange of views with their colleagues on other courts that is promoted by state protection of civil liberties.[33]

Freedom of the Press under State Constitutions

In general, witnesses must answer all pertinent questions put to them during grand jury investigations and/or trials: those who fail to do so may be punished for contempt. However, exceptions to this requirement have been recognized, when its enforcement would imperil certain confidential relationships, such as those between doctor and patient or between priest and parishioner. Journalists have contended that the relationship between reporters and their confidential news sources warrants similar protection. They insist that because confidential sources often are willing to provide information only if their identities can remain secret, compelling reporters to name their sources and/or testify about the information they receive impedes the gathering of news and its transmission to the public. Whatever the validity of this claim, it has not prompted creation of a federal testimonial privilege for reporters. In 1972, the U.S. Supreme Court concluded that the First Amendment does not protect journalists who refuse either to testify or to divulge their sources to grand juries. Subsequent efforts in Congress to enact a press shield law have also proved unavailing.[34]

Perhaps because state courts handle the vast majority of criminal cases, the states had begun to address the issue of a testimonial privilege for reporters long before it emerged on the federal political and legal agendas.[35] In 1896, Maryland enacted the nation's first press shield law, granting a limited testimonial immunity to reporters. A series of highly publicized disputes during the 1930s prompted renewed attention to the issue of testimonial immunity, leading ten additional states to adopt shield laws. During the 1960s and early 1970s, seven more states passed shield laws, in part in response to complaints about the increased issuance of subpoenas to reporters. Finally, when the U.S. Supreme Court ruled that the First Amendment does not excuse reporters from testifying, seven more states responded by extending protection to reporters.

This is not to say that the states have adopted uniform policies on reportorial privilege. Not all states accord a testimonial privilege to journalists, and even those that do still differ over who is entitled to the privilege and over what the privilege entails. Some states, such as California, have protected reporters against contempt citations but not against charges of obstruction of justice or against directed verdicts in libel cases. Other states, among them Arizona and Ohio, authorize reporters to withhold only the names of sources, whereas others, such as Delaware and Michigan, allow reporters to protect both their sources and the information they receive. Finally, some states afford protection only to professional journalists connected with the formal news media, but others extend protection to freelancers and other persons engaged in news gathering or research.

Even within individual states, significant changes have occurred over time in the protection afforded to reporters. In several states, the scope of press privileges has emerged through interaction between the legislature and the courts, with legislators responding to narrowing constructions of press shield laws by extending broader protection. For example, on three separate occasions, the New Jersey legislature amended the state's shield law in response to judicial rulings that had construed it narrowly.[36] After California's courts repeatedly had narrowed the scope of the state's shield law, the citizens responded by amending the California Constitution to give constitutional protection to reporters' testimonial privilege.[37]

Our survey of state responses to claims of reportorial privilege leads to three general observations. First, by the time civil liberties issues emerge as part of the nation's political and legal agendas, oftentimes (as was the case with press shield laws) the states had addressed the issues and confronted the difficult task of defining the scope of those liberties. This, in turn, suggests that the federal government can—and should—profit from the example and experience of the states.[38] Again, this underlines how the nation's federal system promotes a beneficial dialogue on civil liberties issues.

Second, the willingness of state legislatures to enact press shield laws and to repudiate narrowing judicial constructions of them confirms that state statutory law, as well as state constitutional law, can provide important safeguards for civil liberties.

Finally, the recent flurry of cases involving the state constitutional right of reporters to gain access to pretrial hearings suggests that both state legislatures and state courts will continue to be involved in addressing the right of journalists to obtain information controlled by government.[39]

Church and State in the States

The Constitutional Context

The absence of federal law has afforded states the opportunity to define rights on private property and to protect the confidentiality of reporters' sources. However, the role of state civil liberties law is not merely interstitial. The states can pursue an independent legal course and make a substantial contribution even when there is a body of federal law bearing on an issue. A prime example of such state independence is to be found in the constitutional law of church and state.[40]

Prior to the Supreme Court's incorporation of the establishment clause in 1947, the states had primary responsibility for regulating the relationship between church and state. Incorporation inaugurated a new era of federal judicial involvement and doctrinal development. Yet, this increased federal activity has not diminished the importance of state constitutional guarantees. Although both federal and state charters enforce some degree of separation between church and state, state bills of rights typically have avoided the apparent vagueness of the First Amendment's ban on laws "respecting an establishment of religion." Instead, most state constitutions contain specific and detailed provisions governing the relationship between church and state. These provisions, when considered in light of the controversies that engendered them, amply justify an independent state jurisprudence.

Generally speaking, state constitution-making on church and state has occurred in two phases. The first phase commenced after independence, when the original states had to determine whether to maintain their existing religious establishments. Although most did not immediately eliminate their establishments, independence triggered a movement toward disestablishment, best exemplified by the famous campaign for religious liberty in Virginia. This movement found expression in early state constitutional provisions guaranteeing freedom of conscience and prohibiting preference to any religious sect. None of the states subsequently admitted to the Union created a religious establishment, and by the 1830s intrastate pressures, as well as the federal example, led the original states to eliminate the last vestiges of their official establishments. As those states adopted new constitutions or amended their old one, they used the occasion to remove outdated provisions recognizing religious establishments from their fundamental law.

Despite the elimination of official establishments, many states continued to provide unofficial support to Protestant Christianity, particularly in the public schools. As long as the nation's population remained relatively homogeneous religiously, this support produced little controversy. However, the immigration to America of large numbers of Roman Catholics, who objected to this "Protestantizing" of public education, prompted a second phase of state constitution-making. In response to Catholic demands for state funding of their schools and for the elimination of Protestant religious practices in public schools, several states strengthened their constitutional bans on aid to religious institutions and their mandates that school funds be expended only for public schools. Other states responded to the controversy by adding similar provisions to their constitutions. Finally, several states that were settled later or that escaped sectarian conflict over public education nonetheless borrowed the strict constitutional language of their sister states. As a result, long before the federal courts addressed the issue, most state constitutions had recorded a considered constitutional judgment on aid to religious institutions. In fact, their emphatic and detailed prohibitions of such aid appear to justify a separationist reading that may yield results different from those obtained under the First Amendment.

Aid to Parochial Schools

Given the specificity of these state constitutional prohibitions, it is hardly surprising that few cases have arisen involving direct aid to religious schools and that state courts have consistently struck down such aid as unconstitutional.[41] State cases since World War II have focused instead on indirect aid to religious schools and their students, such as the provision of transportation or textbooks to children attending parochial schools. While the U.S. Supreme Court has ruled that such programs do not violate the First Amendment,[42] the states have divided over their constitutionality. In part, this division reflects textual differences among state constitutions. For example, after their high courts had invalidated programs authorizing the transportation of students to parochial schools, Wisconsin and New York adopted constitutional amendments expressly permitting their reinstitution.[43] On the other hand, the Alaska Supreme Court concluded that, given Alaska's emphatic constitutional ban on aid to religious institutions, the failure to include a clause permitting indirect aid implied that such aid was impermissible.[44]

In part, however, interstate disagreements on the constitutionality of indirect aid can be traced to whether state judges are willing to read state constitutional provisions as independent judgments on the permissibility of aid to religious institutions. Generally speaking, those state courts that have invalidated programs of indirect aid have displayed a greater sensitivity to the distinctive language in state constitutions and to the historical experiences that produced it. *Gaffney* v. *State Department of Education*, which involved the constitutionality of Nebraska's textbook-loan law, can serve as a model of independent constitutional analysis.[45] Eschewing the U.S. Supreme Court's doctrinal formulations, the Nebraska Supreme Court focused instead on the state's constitutional prohibition of any "appropriation in aid of any sectarian institution or any educational institution not owned and controlled by the state." The clarity of this language, the court insisted, made interpretation unnecessary, and its broad sweep admitted of no exceptions. Moreover, the records of the convention that drafted the provision confirmed that a major aim was to devise a precise prohibition that would prevent sectarian conflict over the funding of church-related schools. The Nebraska Supreme Court therefore ruled the law unconstitutional.

Other state courts have likewise emphasized the distinctive language of their state constitutions in justifying development of an independent constitutional position. The California Supreme Court, for example, concluded that the state constitution's ban on expenditures for "any sectarian purpose" was designed to prevent the state from providing benefits to sectarian schools that furthered their educational purpose. On that basis, the court invalidated a textbook loan program.[46] Similarly, the Idaho Supreme Court, in striking down a state law authorizing the transportation of students to nonpublic schools, reasoned that the uncompromising prohibitory language in the Idaho Constitution was purposely included to place even greater restrictions on government than that found in the First Amendment.[47] Finally, the Massachusetts high court, noting that a challenged textbook loan program aided sectarian schools in carrying out their essential educational function, held that it violated a state constitutional amendment, adopted following its 1913 decision, which ruled out the "use" of money for maintaining or aiding sectarian schools.[48] If the U.S. Supreme Court adopts a more accommodationist stance on aid to religious institutions, as has been predicted, it can be expected that state courts will be called on increasingly to determine whether such aid violates the state constitution.

Conclusion

Our survey of how state law has helped to define and protect civil liberties, although hardly exhaustive, permits some general observations. First, state involvement in protecting rights is nothing new. It was the states that first devised bills of rights, and it was the states that had primary responsibility for defining and protecting rights for over a century after the nation was created. Thus, the "new judicial federalism" and the recent upsurge of interest in state civil liberties law should be heralded not as an innovation, but as the rediscovery of a traditional aspect of American federalism.

Second, throughout the nation's history, the states have utilized a variety of legal means to safeguard rights. Among the most familiar of these are state bills of rights, which have been employed to complement, supplement, and extend the protections available under the U.S. Constitution. However, other state constitutional provisions—for example, education clauses banning sectarian influences in publicly funded schools—also have served to safeguard civil liberties. So, too, have state statutes, such as those protecting reporters' confidential sources. Finally, state courts have invoked the common law and their own rulemaking authority to secure individual rights.[49] Thus, our examples underscore the variety of state initiatives on behalf of rights.

Third, as the struggle for religious liberty in Virginia illustrates, these initiatives—constitutional, legislative, and judicial—have served not only to protect rights within the borders of the state but also to provide impetus and guidance for efforts by other states and the national government to secure rights. This coincides with the pattern of cooperative activity that has characterized many aspects of American federalism throughout the nation's history.

Having said this, the fact remains that contemporary state efforts to safeguard civil liberties occur in the context of a federal system in which the federal courts have assumed a major role in protecting rights. This heavy federal influence underlines the crucial importance of the legal relationship between federal and state law—and particularly between federal and state bills of rights. It is well established that state constitutional rulings resting on "independent and adequate state grounds" are exempt from federal judicial scrutiny.[50]

When, then, is it appropriate to interpret state bills of rights independently? Some jurists—most notably, Justice Hans Linde of the Oregon Supreme Court—have concluded that the correct answer is *always*.[51] It is their contention that the logic of our federal system requires that state judges look first to the law of their own state in deciding cases and then to federal law only when a case cannot be resolved on state grounds. Even jurists who have not endorsed this "state law first" position have recognized that, when state law diverges from federal law, it must be given independent effect.[52] A moment's reflection suggests that such divergence is likely to occur frequently.

As we have noted earlier, many state constitutional provisions, such as state guarantees of privacy and prohibitions on undue harshness in punishment, have no federal constitutional analogues.[53] Thus, if states are to remain faithful to their law, they must seek the meaning of those guarantees independently.

Furthermore, whereas federal constitutional guarantees secure rights only against governmental infringement, state guarantees may protect rights against private infringement as well. In some instances, state constitutions do so expressly.[54] In others, as our discussion of state free speech provisions has shown, the state guarantees do not specify to whom their constitutional strictures are addressed. Although some state courts have been influenced by federal constitutional doctrine to read a "state action" requirement into these constitutional guarantees, many scholars and jurists have challenged this practice as unwarranted. Indeed, some scholars have insisted that in the absence of express language to the contrary, state guarantees should be read to reach private as well as governmental action.[55] Whatever the validity of this contention, fidelity to state constitutions demands that the scope of state protection be determined not by reference to federal constitutional doctrine, but rather by independent analysis of state guarantees.

In addition, as our discussion of state provisions on church and state has shown, even state provisions that restrict only governmental action and have some sort of federal analogue often differ from their federal counterparts in language and/or historical origins. In such circumstances, sensitivity to the federal character of the American polity should caution against assuming too readily that state protections are merely functional equivalents of federal constitutional guarantees.

Finally, even when the text of state and federal constitutional provisions are identical, this does not mean that state officials—be they judges, executives, or legislators—are obliged to accept the U.S. Supreme Court's interpretation of the federal guarantee as authoritative, foreclosing independent interpretation of the state provision. Federal precedent may be persuasive, but it is not authoritative; state officials have an obligation to seek the best possible interpretation of their own constitutions. In fact, some scholars have argued that state courts should avoid taking their cues from U.S. Supreme Court rulings because the institutional positions of the state and federal courts are quite dissimilar.[56] As the nation's highest court, the U.S. Supreme Court is constrained by considerations of federalism and the separation of powers that may prevent it from according full protection to rights. Because state courts do not operate under such constraints, it is argued, they should feel free to go beyond federal rulings that seem to underprotect civil liberties. In the next two chapters, which deal with state constitutional protections of the rights of criminal defendants and of equality, we shall see how they have done so.

NOTES

[1] This was established authoritatively in Baron v. Baltimore, 32 U.S. (7 Peters) 243 (1833).

[2] Gitlow v. New York, 268 U.S. 653 (1925) and Stromberg v. California, 283 U.S. 359 (1931), marked the first invalidation of a state law on federal free speech grounds, and Near v. Minnesota, 283 U.S. 697 (1931), the first invalidation of a state law as an infringement of the federal freedom of the press.

[3] For an overview, see Richard C. Cortner, *The Supreme Court and the Second Bill of Rights* (Madison: University of Wisconsin Press, 1981).

[4] Relevant cases include: Robinson v. California, 370 U.S. 660 (1962) (cruel and unusual punishment); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Murphy v. Waterfront Commission, 378 U.S. 52 (1964) (self-incrimination); Pointer v. Texas, 380 U.S. 400 (1965) (confrontation of witnesses); Kopfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial); Duncan v. Louisiana, 391 U.S. 145 (1968) (trial by jury); and Benton v. Maryland, 392 U.S. 784 (1969) (double jeopardy).

[5] For an overview of these early cases, see Donald E. Wilkes, Jr., "The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court," *Kentucky Law Journal* 62 (1974): 421-451.

[6] For a bibliography of the literature on the new judicial federalism and a listing of judicial rulings, see Ronald K.L. Collins and Peter J. Galie, "State Constitutional Rights Decisions," *National Law Journal* 11 August 1986. Since December 1987, the Association of State Attorneys General has published a monthly survey of developments in state constitutional law. See also John Kincaid, "State Court Protections of Individual Rights under State Constitutions: The New Judicial Federalism," *The Journal of State Government* 61 (September/October 1988): 163-169.

[7] Ronald K.L. Collins, Peter J. Galie, and John Kincaid, "State High Courts, State Constitutions, and Individual Rights Litigation since 1980: A Judicial Survey," *Publius: The Journal of Federalism* 16 (Summer 1986): 141-162.

[8] Collins and Galie, "State Constitutional Rights Decisions."

[9] For further discussion of the protection of rights under state constitutions, see chapters 5 and 6.

[10] For a recent elaboration of the justifications for federalism, see Daniel J. Elazar, *Exploring Federalism* (Tuscaloosa: University of Alabama Press, 1987), chapter 3.

[11] It follows that if states have concurrent responsibility for defining and protecting rights, state officials have a constitutional obligation to honor and enforce this body of state law, even though doing so may lead to different definitions of rights from state to state.

[12] Whereas some state constitutions, such as Virginia's and Pennsylvania's, were prefaced by eloquent declarations of individual rights, others—for example, New Jersey's—had no bill of rights at all. Even those states that adopted bills of rights differed in what was protected. Compare, for example, the treatment of religion under the Massachusetts and Virginia constitutions. For a more general treatment of early state constitutional guarantees, see William E. Nelson and Robert C. Palmer, *Liberty and Community* (New York: Oceana, 1987).

[13] For an overview of state provisions, see Robert Dowlut and Janet A. Knoff, "State Constitutions and the Right to Keep and Bear Arms," *Oklahoma City University Law Review* 7 (Summer 1982): 177-241.

[14] See Ronald K.L. Collins, "Bills and Declarations of Rights Digest," in *The American Bench*, 3rd ed. (Sacramento: Reginald Bishop Forster and Associates, 1985), pp. 2491-2493.

[15] For a listing and discussion, see chapter 6.

[16] The U.S. Supreme Court candidly admitted as much in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973). More generally, see Robert F. Williams, "In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result," *South Carolina Law Review* 35 (Spring 1984): 353-404, and Lawrence G. Sager, "Fair Measure: The Legal Status of Underenforced Constitutional Norms," *Harvard Law Review* 91 (April 1978): 1212-1264.

[17] For discussion of how state courts have dealt with this issue under their state constitutions, see G. Alan Tarr, "State Constitutions and First Amendment Rights," in Stanley Friedelbaum, ed., *Human Rights in the States* (Westport, Connecticut: Greenwood Press, 1988).

[18] Representative cases include Serrano v. Priest, 487 P.2d 1241 (Cal. 1971) and Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J. 1975).

[19] For an overview of these provisions, see Collins, pp. 2502-2505.

[20] For background on state rulings on the freedoms of speech and of the press prior to incorporation, see David B. Rabban, "The First Amendment in Its Forgotten Years," *Yale Law Journal* 90 (January 1981): 514-595, and Margaret A. Blanchard, "Filling in the Void: Speech and Press in State Courts Prior to Gitlow," in Bill F. Chamberlin and Charlene J. Brown, eds., *The First Amendment Reconsidered* (New York: Longman, 1982).

[21] This focus on *governmental* infringements on rights is characteristic of the federal Constitution—only the Thirteenth Amendment directly forbids private violations of individual rights.

[22] Marsh v. Alabama, 326 U.S. 501 (1946).

[23] Lloyd Corporation v. Tanner, 407 U.S. 551 (1972) and Hudgens v. National Labor Relations Board, 424 U.S. 507 (1976), overruling Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968).

[24] This underlines the important point that the states, in exercising their traditional legal responsibilities, often make decisions that affect civil liberties.

[25] Michigan Constitution, Art. I, sec. 5. Other state constitutional provisions, such as those relating to access to the ballot, may also be relevant in specific cases. See Batchelder v. Allied Stores International, 445 N.E.2d 590 (Mass. 1983).

[26] On the importance assigned to property rights by state constitution-makers, see, for example, the Arkansas Declaration of Rights, Art. II, Sec. 22: "The right of property is before and higher than any constitutional sanction." On the need to compensate property owners, see, for example, Illinois Constitution, Art. I. Sec. 15: "Private property shall not be taken or damaged for public use without just compensation as provided by law." See generally chapter 7 of this study.

[27] 592 P.2d 341 (Cal. 1979).

[28] Cases decided shortly after the ruling in Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980), include: State v. Schmid, 423 A.2d 615 (N.J. 1980): Commonwealth of Pennsylvania v. Tate, 432 A.2d 1382 (Pa. 1981): State v. Felmet, 273 S.E.2d 708 (N.C. 1981); Alderwood Associates v. Washington Environmental Council, 635 P.2d 108 (Wash. 1981); and Batchelder v. Allied Stores International, 445 N.E.2d 590 (Mass. 1983).

[29] 635 P.2d at 112.

[30] Cologne v. Westfarms Associates, 409 A.2d 1201 (Conn. 1984); Woodland v. Michigan Citizens Lobby, 378 N.W.2d 337 (Mich. 1985); and Shad Alliance v. Smith Haven Mall, 498 N.Y.S.2d 99 (N.Y. 1985). One court that initially endorsed a right of free speech on private property appears to be reconsidering its position: Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Insurance Co., 515 A.2d 1331 (Pa. 1986).

[31] See Brown v. Davis, 495 A.2d 900 (N.J. Sup. Ct. 1984), and Jacobs v. Major, 390 N.2d 86 (Wis. App.1986). For possible solutions to these difficulties, see Martin B. Marguilies, "Westfarms' Unquiet Shade," *University of Bridgeport Law Review* 7 (1986): 1-45; and Sanford Levinson, "Freedom of Speech and the Right of Access to Private Property under State Constitutional Law," in Bradley D. McGraw, ed., *Developments in State Constitutional Law* (St. Paul: West Publishing Co., 1985).

[32] For discussion of this dialogue, see G. Alan Tarr and Mary Cornelia Porter, *State Supreme Courts in State and Nation* (New Haven: Yale University Press, 1988), chapter 1.

[33] For a ruling that suggests a possible new direction for state constitutional law dealing with freedom of expression, see Oregon v. Henry, 732 P.2d 9 (Ore. 1987).

[34] Branzburg v. Hayes, 408 U.S. 665 (1972). An analysis of congressional failure to pass a shield law is found in Maurice Van Gerpen, *Privileged Communication and the Press* (Westport, Connecticut: Greenwood Press, 1979), chapter 7.

[35] Background on state shield laws and their interpretation can be found in Geroen, *Privileged Communication*; Arthur B. Hanson, *An Analysis of State Newsmen's Privilege Legislation and Cases Arising Thereunder* (Washington, DC: 1972); and "Comment. The Newsman's Privilege after *Brazburg*: The Case for a Federal Shield Law," *U.C.L.A. Law Review* 24 (October 1976): 160-192.

[36] Following judicial rulings in State v. Donovan, 30 A.2d 421 (Sup. Ct. 1943) and Brogan v. Passaic Daily News,

123 A.2d 473 (N.J. 1956), the New Jersey legislature amended the state's shield law to extend coverage, N.J. Stat. Ann. Sec 2A: 84A-21 (West 1976) (enacted 1960). After In re Bridge, 295 A.2d 3 (App. Div.), certif. denied, 299 A 2d 78 (1972), cert. denied, 410 U.S. 991 (1973), the legislature again amended the shield law, 1977 N.J. Laws 1027. Finally, responding to In re Farber, 394 A.2d 330, cert. denied, 439 U.S. 997 (1978), the New Jersey legislature in 1980 further extended the protection afforded reporters, N.J. Stat. Ann. Sec. 2Z:84A-21.1 to 21.9 (West Supp. 1983-1984).

[37] California Constitution, Art. I Sec. 2(b), adopted in response to Farr v. Superior Court, 99 Rptr. 342 (Ct. App. 1971), cert. denied, 409 U.S. 1011 (1972), and Rosato v. Superior Court, 124 Cal. Rptr. 427 (Ct. App. 1975), cert. denied, 427 U.S. 912 (1976). The New Mexico Supreme Court invalidated the state's shield law as a legislative invasion of the judiciary's authority to establish rules of evidence. See Ammerman v. Hubbard Broadcasting, Inc., 551 P.2d 1354 (N.M. 1976).

[38] Some federal judges have acknowledged their debt to state tribunals. See, for example, William J. Brennan, Jr., "Some Aspects of Federalism," *New York University Law Review* 39 (1964): 947.

[39] Relevant cases include: KFGO Radio, Inc. v. Rothe, 298, N.W.2d 505 (N.D. 1980), and State ex rel. Oregonian Publishing Co. v. Deiz, 613 P.2d 23 (Ore. 1980).

[40] For a more detailed treatment of the historical background of state provisions on church and state, see G. Alan Tarr, "Religion under State Constitutions," *Annals of the American Academy of Political and Social Science* 498 (March 1988): 65-75.

[41] See, for example, Harfst v. Hoegen, 163 S.W.2d 609 (Mo. 1942), and Berghorn v. School District, 260 S.W.2d 573 (Mo. 1953). The sole instance of a state ruling permitting direct aid—Opinion of the Justices, 102 N.E. 464 (Mass. 1913)—prompted a constitutional amendment prohibiting aid: Massachusetts Constitution Amend., Art. 46, Sec. 2.

[42] On bus transportation, see Everson v. Board of Education, 330 U.S. 1 (1947), and on the loaning of textbooks, see Board of Education v. Allen, 392 U.S. 236 (1968).

[43] Reynolds v. Nusbaum, 115 N.W.2d 761 (Wisc. 1962), reversed by amendment, Wisconsin Constitution, Art. I, Sec. 21: and Judd v. Board of Education, 15 N.E.2d 576 (N.Y. 1938), reversed by amendment, New York Constitution, Art. XI, Sec. 4.

[44] Matthew v. Quinton, 362 P.2d 932 (Alas. 1961).

[45] Gaffney v. State Department of Education, 220 N.W.2d 550 (Neb. 1974).

[46] California Teachers Association v. Riles, 632 P.2d 953 (Cal. 1981).

[47] Epeldi v. Egelking, 488 P.2d 860 (Ida. 1971).

[48] Bloom v. School Committee of Springfield, 379 N.E.2d 578 (Mass. 1978).

[49] For the common law as a source of rights, see, for example, State v. Zdanowicz, 55 A. 743 (E and A 1903), in which the New Jersey Supreme Court recognized a common-law right against self-incrimination, a position that it has confirmed in more recent cases, such as State v. Fary, 117 A.2d 499 (N.J. 1955) and State v. Hartley, 511 A.2d 80 (N.J. 1986). For judicial rulemaking as a source of rights, see People v. Jackson, 217 N.W.2d 22, 27-28 (Mich. 1974), in which the Michigan Supreme Court established a suspect's right to counsel, absent extraordinary circumstances, during identification procedures.

[50] For discussion of this doctrine, see Stewart G. Pollock, "Adequate and Independent State Grounds as a Means of Balancing the Relationship between State and Federal Courts," *Texas Law Review* 63 (1985): 977-94.

[51] Hans A. Linde, "Without 'Due Process': Unconstitutional Law in Oregon," *Oregon Law Review* 49 (1970): 125-87; and State v. Kennedy, 66 P.2d 1316 (Ore. 1983).

[52] See, for example, Stewart G. Pollock, "State Constitutions as Separate Sources of Fundamental Rights," *Rutgers Law Review* 35 (Summer 1983): 707-722, and State v. Hunt, 450 A.2d 952, 965-67 (N.J. 1982).

[53] For an example of state constitutional protection of privacy rights, see Alaska Constitution, Art. I, Sec. 22: "the right of the people to privacy is recognized and shall not be infringed." The importance of these state privacy guarantees was underscored by the U.S. Supreme Court in Katz v. United States, 389 U.S. 342, (1967): "The protection of a person's general right to privacy . . . is . . . left largely to the law of the individual states." For an example of state constitutional protection against excessively harsh punishment, see, for example, Rhode Island Constitution, Art. I, Sec. 14: "[N]o act of severity which is not necessary to secure an accused person shall be permitted."

[54] See, for example, Montana Constitution, Art. II, Sec. 4: "Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of . . . religious ideas."

[55] See David M. Skover, "The Washington Constitutional 'State Action' Doctrine: A Fundamental Right *to* State Action," *University of Puget Sound Law Review* 8 (Winter 1985): 221-282.

[56] See Williams, "In the Supreme Court's Shadow," and Sager, "Fair Measure."

Chapter 5

Equality under State Constitutions

State governments are responsible for undertaking or administering most governmental activities that directly affect individual citizens. In undertaking these activities, they are constantly confronted with the task of determining what distinctions between persons are legitimate and what distinctions violate constitutional mandates of equality. Under the federal Constitution, there is only one generally applicable requirement of equality that binds the actions of states. This is the equal protection clause of the Fourteenth Amendment, adopted in 1868, which provides that: "No state shall. . . deny to any person within its jurisdiction the equal protection of the laws." State constitutions, in contrast, contain many different equality provisions, aimed at a range of different but related problems. Although the Fourteenth Amendment equality requirement is well known and extensively analyzed, the state provisions have not received careful attention.[1]

James Madison contended that in a large, geographically and politically diverse nation, there would be less likelihood of oppression of minorities because of the need for continued coalition, political accommodation, and compromise.[2] Madison wrote in *The Federalist*:

> The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.[3]

Madison's concerns seem to have been proven generally true. As responses, state constitutional provisions have aimed at a number of demonstrated problems relating to equality over the years.

Most state constitutions do not contain an explicit "equal protection" clause.[4] They do, however, contain a variety of equality provisions. In some states, broad guarantees of individual rights have been interpreted to require equal protection of the laws in general.[5] Further, most states have generally applicable provisions prohibiting special and local laws, grants of special privileges, or discrimination against citizens in the exercise of civil rights or on the basis of sex. Finally, many state provisions guarantee equality in specific or limited instances—from requiring "uniform" or "thorough and efficient" public schools to requiring uniformity in taxation.

Virtually all of these state constitutional provisions differ significantly from the federal guarantee of equal protection. They were drafted differently, adopted at different times, and reflect the diverse concerns about equality that surfaced during the various eras of state constitutional revision. For example, the broad guarantees of individual rights found in many state constitutions are intended to secure an equality of rights before the law for all persons. The bans on special laws and local laws, however, focus on the substance of the law, seeking to ensure equality (understood as uniformity of treatment) by requiring that laws be of general applicability. The same concern that all citizens be treated uniformly underlies the constitutional prohibitions of special privileges, which protect the general public against preferential treatment for a small group, and the requirement of uniformity in taxation. Conversely, state bans on discrimination on the basis of gender, religion, or race reflect the more familiar concern to protect members of minority groups from majority tyranny. Finally, constitutional requirements of "uniform" or "thorough and efficient" public schools reflect a concern that the state avoid favoritism in the provision of essential state services.

The First State Constitutions

A few early state constitutions contained language similar to the classic language of equality in the Declaration of Independence. Section 1 of the Virginia Bill of Rights, written by George Mason and adopted a month before the Declaration of Independence, provided:

> That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.[6]

Although only Pennsylvania[7] and Massachusetts[8] initially included broad provisions, like that of Virginia,[9] many states now have similarly worded provisions.[10] Notions of equality, however, permeated the first state constitutions with respect to governmental structure, even if not with respect to individual rights.[11] Pennsylvania's "liberal" constitution of 1776 probably pushed equality of consent as far as any of the first state constitutions by providing for a unicameral legislature, with no executive veto.[12] Of course, most states still denied the franchise to blacks, women, and those who did not own property.

Several of the early state constitutions contained another type of general equality provision intended to prohibit grants similar to royal privileges. Section IV of the 1776 Virginia Bill of Rights, for example, provides that "no man, or set of men, is entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services."[13]

It is important to remember the historical context in which the first state constitutions were written. Contrary to the view prevailing today—that constitutional protections exist to be enforced by the courts[14]—concepts of judicial review were still in their infancy in the late 18th century.[15] In other words, judicial enforcement of bill of rights provisions was probably far from their framers' minds. Thus, in many ways, these early provisions, sometimes referred to only as "principles of government,"[16] can be viewed as descriptive rather than normative. Moreover, one must question the drafters' overall commitment to equality because slavery and formal inequality in political participation were allowed to continue, as they were under the U.S. Constitution as well.

Despite these early beginnings, much of the modern judicial doctrine of equality under state constitutions has its textual basis[17] in such state constitutional provisions as Section 1 of the Virginia Bill of Rights. Even though many of these provisions seem only to declare political truths, they have been interpreted to limit state actions.[18] At the same time, general provisions that do not expressly mandate equality, such as New Jersey's Article I, paragraph I, have been interpreted to guarantee equal protection of the law generally.[19] The New Jersey provision, for example, served as the basis for the state Supreme Court's decision rejecting the U.S. Supreme Court's equal protection analysis in *Harris* v. *McRae*[20] and invalidating state restrictions on Medicaid funding for abortion.[21]

Most state courts, however, have not developed doctrine independent of the federal equal protection clause under these kinds of equality provisions.[22] Instead, they seem content not to read into such provisions anything other than what the U.S. Supreme Court has read into the equal protection clause of the Fourteenth Amendment.

Other Generally Applicable Equality Provisions in State Constitutions

Jacksonian Equality Provisions

The wave of constitutional revision in the 1820s did not focus on the generally applicable equality provisions contained in the first state constitutions.[23] Instead, equality issues centered around extending the right to vote to blacks and nonfreeholders and reapportioning legislative representation.[24]

Later in the century, many states amended their constitutions to curb the granting of "special" or "exclusive" privileges. In doing so, voters were reacting to a series of abuses by the relatively unfettered state legislatures, many of which were granting special privileges to powerful economic interests.[25] These provisions were modeled after provisions adopted earlier in other states, such as Section IV of the Virginia Bill of Rights.[26] For example, Article I, Section 20 of the 1859 Oregon Constitution, which was patterned after Indiana's 1851 Constitution,[27] provides: "No law shall be passed granting to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens."[28] These provisions commonly are found in state bills of rights—not in the legislative articles. They reflect the Jacksonian opposition to favoritism and special treatment for the powerful.[29]

Although these provisions may overlap somewhat with federal equal protection doctrine, closer scrutiny reveals significant differences. As Justice Hans Linde of the Oregon Supreme Court has noted, Oregon's Article I, Section 20 and the federal equal protection clause "were placed in different constitutions at different times by different men to enact different historic concerns into constitutional policy."[30] Justice Betty Roberts of the same court has noted further:

> Article I, Section 20, of the Oregon Constitution has been said to be the "antithesis" of the equal protection clause of the fourteenth amendment. . . . While the fourteenth amendment forbids curtailment of rights belonging to a particular group or individual, Article I, Section 20, prevents the enlargement of rights. . . . There is an historical basis for this distinction. The Reconstruction Congress, which adopted the fourteenth amendment in 1868, was concerned with discrimination against disfavored groups or individuals, specifically, former slaves. . . . When Article I, Section 20, was adopted as a part of the Oregon Constitution nine years earlier, in 1859, the concern of its drafters was with favoritism and the granting of special privileges for a select few.[31]

A provision like Oregon's, then, does not seek equal protection of the laws at all. Instead, it prohibits legislative discrimination in favor of a minority.

These provisions may differ in other ways from the federal equal protection clause. Justice Linde suggests that Oregon's provision can cover individuals in addition to classes of people,[32] and that it may not apply to corporations or nonresidents.[33] Moreover, the specific reference to the "passage of laws" may preclude its application to executive action. A similar provision prohibiting grants of "exclusive privileges" was instrumental in the North Carolina Supreme Court's decision invalidating that state's hospital certificate-of-need statute.[34]

Prohibitions on Special and Local Laws

Closely related to the provisions prohibiting grants of special or exclusive privileges are prohibitions on "special" and "local" laws.[35] These provisions, found in the legislative articles of state constitutions, contain either general or detailed limits on the objects of legislation.[36] Special laws are those that apply to specified persons or a limited number of persons—for example an act granting a divorce or a corporate charter. Local laws are those that apply to specified or a limited number of localities—for example an act providing criminal penalties for conduct in only one county.[37] One variety of local law is the "population act" or law which classifies cities according to population. Many states permit this sort of legislation if the basis for the classification can be regarded as rational. In addition, notice requirements usually are included for those subjects that may be dealt with by local laws, giving residents of localities to be affected at least constructive notice of the legislature's intended action.

Though intended in part to curb legislative abuses, these proscriptions on special and local laws reflect a concern for equal treatment under the law. In 1972 the Illinois Supreme Court held that the state's no-fault automobile insurance act violated Article IV, Section 13 of the Illinois Constitution, which provides that "[t]he General Assembly shall pass no special or local law when a general law is or can be made applicable."[38] The statute required only owners of "private passenger automobiles" to purchase no-fault insurance, but imposed substantial limitations on tort recoveries of persons injured by any type of motor vehicle. In distinguishing Illinois' "equal protection" clause,[39] which had been added in 1970,[40] Justice Walter V. Schaefer observed:

> While these two provisions of the 1970 constitution cover much of the same terrain, they are not duplicates, as the commentary to Section 13 of Article IV points out: "In many cases, the protection provided by Section 13 is also provided by the equal protection clause of Article I, Section 2."[41]

He concluded that Article IV, Section 13 imposed a clear constitutional duty on the courts to determine whether a general law "is or can be made applicable," and that "in this case that question must receive an affirmative answer." The constitutionally infirm portions of the statute were therefore invalidated.

Prohibitions on special and local laws have broad application, but they do appear limited to the legislatures, and therefore not to cover executive action. As with other state equality provisions, many state courts interpret special laws provisions by applying federal equal protection analysis.

Discrimination in the Exercise of Civil Rights

In the mid-20th century, a number of state constitutions were amended to include provisions prohibiting discrimination in the exercise of civil rights. Pennsylvania, for example, added a provision in 1967 which directs that "[n]either the Commonwealth nor any political subdivisions thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right."[42] Similar provisions in other states typically limit the proscription to discrimination on the basis of race, color, or national origin.[43]

These antidiscrimination provisions are products of the civil rights movement of the late 1950s and the 1960s. In this respect, they are a good example of state constitutional amendments that "did not direct, but merely recorded, the currents of social change."[44] So far, they have not been treated by the state courts as proclaiming any important new constitutional principle.

The express proscription of *discrimination* against persons in the exercise of their civil rights, in addition to prohibiting the *denial* of rights, provides a strong textual basis for extending such protection beyond federal equal protection doctrine. For example, in *Harris* v. *McRae*,[45] the U.S. Supreme Court held that restrictions on Medicaid funding for abortions did not violate the federal equal protection clause.[46] The Court concluded that a mere failure to fund the exercise of the federal constitutional right to choose abortion did not unconstitutionally burden or limit the exercise of that right.[47] Failure to fund was held neither to deny the right, nor to impose an "unconstitutional condition"[48] on its exercise.

A state provision, such as Pennsylvania's, however, provides a different argument concerning such policies. For example, the right to choose to have an abortion is a clearly established constitutional, or "civil" right based on the U.S. Supreme Court's 1973 decision.[49] So too is the right to bear children, under Supreme Court decisions.[50] It has been argued, therefore, that a state legislature in a state with a provision such as Pennsylvania's that provides funding only for child-birth, while excluding abortion from the Medicaid program, violates the state constitution.[51]

State constitutional provisions prohibiting discrimination in the exercise of civil rights may become increasingly important as state governments expand from regulation into the provision of services.[52] When state governments primarily regulated conduct, prohibiting them from *denying* persons' civil rights was, if adequately enforced,[53] an effective limit. States did not have the leverage of attaching "unconstitutional conditions" to the provision of services; therefore, they could not as easily favor one right over another. When the state acts as a service provider, however, as it does in such programs as Medicaid, it has the opportunity, in Laurence Tribe's words, "to achieve with carrots what [it] is forbidden to achieve with sticks."[54] Thus, to prevent states from illicitly discouraging citizens' exercise of their rights, states have adopted provisions prohibiting discrimination against persons in the exercise of their civil rights.

Specific and Limited Equality Provisions

Although many states have interpreted generally applicable bill of rights provisions so as to guarantee equality under the law, other provisions, not usually found in bills of rights, expressly require equality in specific and limited instances. When applicable, these provisions offer state courts sound textual bases for invalidating state actions. At the same time, these provisions warrant extending equality guarantees beyond those of federal equal protection doctrine. These provisions also allow courts to avoid some of the problems of basing decisions on generally applicable equality provisions.

In *Robinson* v. *Cahill*,[55] for example, the New Jersey Supreme Court held unconstitutional the state's school financing scheme under a provision in the New Jersey Constitution requiring a "thorough and efficient" education.[56] The provision was added to New Jersey's Constitution in 1875, partly to reflect public concern over equality in education.[57] After criticizing the U.S. Supreme Court's approach to federal equal protection cases,[58] the New Jersey court explained why it chose not to base its decision on state "equal protection" doctrine:

> We hesitate to turn this case upon the State equal protection clause. The reason is that the equal protection clause may be unmanageable if it is called to supply categorical answers in the vast area of human needs, choosing those which must be met and a single basis upon which the State must act. . . . [W]e stress how difficult it would be to find an objective basis to say the equal protection clause selects education and demands inflexible statewide uniformity in expenditure. Surely no need is more basic than food and lodging. . . . Essential also are police and fire protection, as to which the sums spent per resident vary with local decision. Nor are water and sundry public health services available throughout the State on a uniform dollar basis.[59]

Thus, the New Jersey court used the state's thorough and efficient education provision as a more "specific and limited" basis for its equality decision, justifying its limitation to the field of education and ensuring that its holding could not be expanded beyond education.

In addition to the education provisions, most states have uniformity in taxation provisions that provide specific grounds for enforcing equality.[60] Tax uniformity provisions require that once a legislative decision is made to tax a type of property or income, everything subject to the tax must be treated uniformly. The legislature may, however, make a decision *not* to tax a type of property, thereby exempting it.[61] It is important to note, though, that while these provisions may be limited in focus, they can be far-reaching in effect. The primary effect of tax uniformity provisions is to mandate equality in property taxation.[62] Such provisions go well beyond the restrictions of the federal equal protection clause.[63] Moreover, not all jurisdictions limit their uniformity provision to property taxes. As the Pennsylvania Supreme Court noted:

> [T]he constitutional standard of uniformity also possesses widespread and far-reaching application. While some other jurisdictions adhere to the view that uniformity applies only to property taxes, our particular constitutional mandate that "[a]ll taxes shall be uniform . . ." is quite clear, and it is settled that this mandate applies to all species of taxes.[64]

Case Study:
Gender Equality in the States

During the 1960s, gender equality emerged as a salient political issue, prompting responses from both the states and federal government.[65] For the states, this involvement was nothing new: historically, it had been state law—constitutional, statutory, and common law—that defined the political and civil rights and the legal capacities of women. State law had, for instance, governed contractual relations, regulating the capacity of married women to enter into contracts without their husbands' consent. It had defined property rights, including the right of married women to hold property in their own name. It had regulated domestic relations, including such matters as divorce, alimony, child support, and child custody. It had also established police power regulations that affected women's opportunities to seek and obtain employment.[66]

Although federal law and judicial rulings have assumed an increasing importance, state law continues to play a major role in defining the legal status of women. However, constitutional changes have dramatically altered the substance of that law. This section documents some of those changes in order to show how state law can contribute—and has contributed—to promoting equality.

State Constitutional Guarantees

Today, in some fashion or another, 19 state constitutions expressly bar gender discrimination.[67] Some state guarantees long antedated federal involvement in securing women's rights. As early as the 1890s, for example, the Wyoming and Utah Constitutions mandated equal enjoyment of civil, political, and religious rights and privileges for all men and women. In its 1947 constitution, New Jersey modified its traditional recognition of natural rights, inserting gender-neutral language in order to ensure gender equality.[68] Most states, however, adopted their constitutional bans on gender discrimination between 1968 and 1976, a period roughly coincident with the proposal of the federal *Equal Rights Amendment* (ERA) and its submission to the states for ratification.

Given the timing of their adoption, it is not surprising that many of the "little ERAs," as they are sometimes called, resemble the proposed federal model. However, several have distinctive elements. Montana's, for example, extends broader protection, expressly barring gender discrimination by private parties as well as by government. Several others omit a "state action" requirement, although the guarantees usually have been interpreted to apply only against governmental infringements on equality.[69] California's guarantee is more focused than was the proposed federal ERA, mandating merely that the right to engage in a profession shall not be denied on the basis of gender. Louisiana's ERA is more tolerant of gender classifications, prohibiting gender distinctions only if they are arbitrary, capricious, or unreasonable.

In interpreting state guarantees of gender equality, state courts have generally looked for direction to the U.S. Supreme Court's interpretations of the equal protection clause and to commentaries on the (unratified) federal Equal Rights Amendment. However, instead of promoting doctrinal uniformity among the states, this practice has merely duplicated on an interstate basis the complexities of the U.S. Supreme Court's equal protection jurisprudence. Thus, the Illinois Supreme Court, among others, has interpreted its constitution to require "strict scrutiny" of gender classifications, the same standard used by federal courts in determining the validity of racial classifications.[70] Some state courts, however, have adopted a less rigorous standard. The Utah Supreme Court, for instance, has endorsed the U.S. Supreme Court's "rational relationship" test, upholding gender distinctions as long as they are reasonably related to the achievement of a valid state aim.[71] In contrast, some courts—among them, the Washington, Maryland, and Pennsylvania supreme courts—have read their constitutions as imposing the same absolute ban on gender discrimination that was sought in the federal ERA.[72]

Although the level and focus of litigation under these provisions have varied from state to state, some general patterns have emerged. First, a number of constitutional challenges have come from male litigants who insisted that state laws or judicial rulings imposed unequal burdens on them. The conflict over child support has been particularly intense. In addressing this issue, courts in Washington, Texas, and Pennsylvania have concluded that child support is a responsibility of both parents. However, mathematically equal contributions from both parents have not been required, and in considering child support judges have recognized that nonmonetary as well as monetary contributions may be relevant.[73] Second, men have challenged state laws and practices that allegedly penalize them or deny them benefits solely on the basis of their sex. Illustrative of such challenges are the constitutional attacks on the "tender years doctrine," under which wives are granted a preference in contested custody cases involving young children.[74] Third, defendants have asked courts to strike down criminal statutes, such as rape laws, that have used gender-based language in defining crimes. State courts, however, have generally refused to allow defendants to use state ERAs as a shield from criminal liability.[75] Fourth, in several instances, women have invoked state constitutional guarantees successfully against outmoded common-law rules, such as the prohibition on wives' recovering damages for negligent loss of consortium.[76] Finally, women have invoked state constitutional guarantees to challenge denials of access or opportunities, most notably in several cases involving restrictions on their participation on athletic teams.[77]

What is most striking about the litigation under state ERAs, however, is its infrequency. Whereas one might have expected that the adoption of new state constitutional guarantees during the 1970s would have produced a flurry of challenges to state laws and practices, in fact, during the decade no state supreme court heard as many gender equality cases as did the U.S. Supreme Court. In part, the paucity of litigation under state constitutional provisions reflects the preference of litigants for federal forums and federal law, particularly in such areas as job discrimination. In part, however, it also testifies to the efforts of other branches of state government to vindicate the constitutional commitment to equal rights. State attorneys general have issued numerous opinions providing guidance on the meaning of these constitutional guarantees, thus reducing the need for recourse to the courts.[78] Even more important, state legislatures have taken the initiative in reforming state law to conform to constitutional requirements.

Legislative Implementation

When 14 states adopted "little ERAs" between 1968 and 1976, they committed themselves to eradicating gender discrimination and securing increased opportunities for women. In some states—for example, Connecticut—this constitutional commitment was reflected in an impressive body of legislation promoting gender justice.[79] In others, adoption of the "little ERA" provided the impetus for state legislatures and state attorneys general to eliminate gender discrimination. New Mexico's experience in implementing its ERA illustrates the crucial role that state legislatures have played in conforming state law to constitutional mandates.[80] After ratification of the amendment in November 1972, the New Mexico legislature appointed an Equal Rights Committee to oversee its implementation. This committee, with the assistance of special committees established by the New Mexico state bar association, reviewed the entire New Mexico code to identify provisions inconsistent with the amendment and recommended statutory reforms needed to eliminate gender bias from New Mexico law. The New Mexico legislature acted quickly on most of these recommendations, approving changes in 26 statutes and two amendments during its first session following ratification of the constitutional ban on gender discrimination.

What occurred in New Mexico has occurred in other states as well. Several states—among them, Alaska, Texas, and Washington—have undertaken a comprehensive review and revision of their codes to bring them into conformity with constitutional requirements. Some, such as Connecticut, have established permanent commissions to monitor compliance with constitutional mandates. Others, such as Hawaii, have sought to ensure gender equality through piecemeal reform of their law. Even states, such as Virginia, that have not mounted a comprehensive reform effort have modified their law to eliminate glaring inequities.[81] In sum, then, the legislative, executive, and judicial branches of state governments have all played an important role in promoting and safeguarding gender equality.

Conclusion

The states, through provisions included in their constitutional texts and through statutes, attorney general opinions and judicial decisions, have addressed a range of equality concerns over the years since 1776. State law, in fact, contains a much broader range of provisions concerning equality than is found in federal law. A combination, however, of the states' earlier unwillingness to enforce these provisions aggressively and the highly visible initiatives under federal law since the 1950s, has led to an almost instinctive tendency to look to the federal government to deal with equality issues. As James Madison warned, threats to equality may be more likely to arise within the states, justifying a renewed interest in, and concern with the enforcement of, state law provisions on equality.

NOTES

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[1] For a particularly noteworthy exception, see Susan P. Fino, *The Role of State Supreme Courts in the New Judicial Federalism* (Westport, Connecticut: Greenwood Press, 1987).

[2] See generally Note, "A Madisonian Interpretation of Equal Protection Doctrine," *Yale Law Journal* 91 (1982): 1403 (contending that federal equal protection doctrine should be enforced more strictly against states than the federal government); see also Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1969), pp. 504-506 (suggesting that Madison saw Congress as less likely to succumb to the majoritarian democratic "excesses" exhibited by state legislatures).

[3] *The Federalist* No. 10, p. 135 (J. Madison) (B. Wright, Ed. 1961). Madison added in *The Federalist* No. 51: "In the extended republic of the United States and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good," p. 359.

[4] Sidney Z. Karasik, "Equal Protection of the Law under the Federal and Illinois Constitutions," *DePaul Law Review* 30 (1981): 270 n.33 ("Illinois was only the eighth state to include an equal protection clause in its constitution.")

[5] New Jersey's "equal protection" doctrine, for example, is based on a provision that states: "All persons are by nature free and independent, and have natural and unalienable rights, among which are those enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." New Jersey Constitution, Art. I, para. 1 (1947); see, for example, Right to Choose v. Byrne, 91 N.J. 287, 303-05, 450 A.2d 925, 933-34 (1982).

[6] Virginia Constitution, Bill of Rights 1 (1776).

[7] Pennsylvania Constitution, Art. I. 1 (1776).

[8] Massachusetts Constitution, Pt. I, Art. I (1780).

[9] See Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* (Chapel Hill: University of North Carolina Press, 1980), p. 176.

[10] See e.g., New Jersey Constitution, Art. I, para I (1844).

[11] See generally Ronald J. Peters, Jr., *The Massachusetts Constitution of 1780: A Social Compact* (Amherst: University of Massachusetts Press, 1978), p. 190 (discussing these two facets of political equality).

[12] See J. Paul Selsam, *The Pennsylvania Constitution of 1776: A Study in Revolutionary Democracy* (Philadelphia: University of Pennsylvania Press, 1936); Richard A. Ryerson,"Republican Theory and Partisan Reality in Revolutionary Pennsylvania: Toward a New View of the Pennsylvania Constitutionalist Party", in *Sovereign States in an Age of Uncertainty*, Ronald Hoffman and Peter J. Albert, eds. (Charlottesville: University Press of Virginia, 1981), p. 94.

[13] Virginia Constitution, Bill of Rights 4 (1776). For a similar provision, see Massachusetts Constitution, Pt. I, Art. VI (1780).

[14] On the nature of "constitutions" in the revolutionary era, see Cecelia M. Kenyon, "Constitutionalism in Revolutionary America," in Roland J. Pennock and John W. Chapman, eds., *Nomos XV: Constitutionalism* (New York: New York University Press, 1979), pp. 86-92.

[15] See William E. Nelson, "The Eighteenth Century Background of John Marshall's Constitutional Jurisprudence," *Michigan Law Review* 76 (1978): 937; William E. Nelson, "Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860," *University of Pennsylvania Law Review* 120 (1972): 1168.

[16] Frank P. Grad, "The State Bill of Rights," in V. Ranney, ed., *Con-Con: Issues for the Illinois Constitutional Convention* (Urbana: Institute of Government and Public Affairs, University of Illinois, 1970), p. 34. But see Kenyon, "Constitutionalism," pp. 96-99 ("natural law" concepts, though largely ideological, were thought to be enforceable through "public opinion, elections . . . [and] revolution").

[17] On the role of textual basis in judicial interpretation of state constitutions, see Hans A. Linde, "Without 'Due Process': Unconstitutional Law in Oregon," *Oregon Law Review* 49 (1970): 131

[18] See, for example, Henry v. Bauder, 213 Kan. 751, 518 P.2d 362 (1974). There, the Kansas Supreme Court observed: "While . . . [the equality] provisions of our Bill of Rights declare a political truth, they are given much the same effect as the clauses of the Fourteenth Amendment." 752-53, 518 P.2d at 365; see also State v. Currens, 111 Wis. 431, 434-35, 87 N.W. 561, 562 (1901) (although phrased like the Declaration of Independence, "life, liberty, and the pursuit of happiness" provision judicially enforceable); Winters v. Myers, 92 Kan. 414, 420-25, 140 P. 1033, 1036-37 (1914) (noting that constitutional provisions declare political truths and legislation may not "trench upon the political truths which they affirm").

[19] Peper v. Princeton University Board of Trustees, 77 N.J. 55, 79, 389 A.2d 465, 477 (1978). New Jersey's constitutional provision is quoted in footnote 5.

[20] 448 U.S. 297 (1980) (upholding termination of funds for abortion in the Medicaid program). See generally Robert F. Williams, "In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result," *South Carolina Law Review* 35 (1984): 364-365.

[21] Right to Choose v. Byrne, 91 N.J. 287,305,450 A.2d 925, 934 (1982).

[22] See, for example, Haase v. Sawicki, 20 Wis. 2d 308, 311 n.2, 121 N.W.2d 876, 878 n.2 (1963).

[23] See generally Merrill Peterson, *Democracy, Liberty, and Property: The State Constitutional Conventions of the 1820s* (Indianapolis: Bobbs-Merrill, 1966) (discussion of the Massachusetts, New York, and Virginia conventions).

[24] Ibid., pp. 59, 214, 377.24.6

[25] See James Willard Hurst, *The Growth of American Law: The Law Makers* (Boston: Little Brown & Co., 1950), pp. 241-42; William F. Swindler, "Minimum Standards of Constitutional Justice: Federal Floor and State Ceiling," *Missouri Law Review* 49 (1984): 2; A.J. Thomas, Jr., and Ann Van Wynen Thomas, "The Texas Constitution of 1876," *Texas Law Review* 35 (1959): 907.

[26] See note 13 and accompanying text. The concern of the newer provisions was with legislative rather than royal favoritism. See Linde, "Without 'Due Process,' " p. 141.

[27] See Linde, "Without 'Due Process,' " p. 141. As to the "copying" or "borrowing" of state constitutional provisions during westward expansion, see Robert F. Williams, "State Constitutional Law Processes," *William and Mary Law Review* 24 (1983): 174 n.14.

[28] Oregon Constitution, Art. I, 20 (1859).

[29] Historian Rush Welter observed: "Hence the whole thrust of Jacksonian thought was in the first instance negative, an effort to eliminate institutions and practices that an earlier generation had more or less taken for granted. The "aristocracy" that Jacksonians complained of consisted of selective access to power, prosperity, or influence. At bottom it was a political rather than a social or economic concept: in Jacksonian eyes, an "aristocrat" was someone who was empowered by law to affect the economic and social welfare of his contemporaries, or who enjoyed legal privileges that he could turn to his own account in an otherwise competitive economy." Rush Welter, *The Mind of America: 1820-1860* (New York: Columbia University Press, 1975), pp. 77-78 (footnote omitted). As to "Jacksonian Democracy," see R. Lawrence Hachey, "Jacksonian Democracy and the Wisconsin Constitution," *Marquette Law Review* 62 (1979): 485.

[30] Linde, "Without 'Due Process,' " p. 141. For a listing of similar state provisions, see p. 182 n.43. For opinions by Justice Linde on Art. I, 20, see State v. Freeland, 295 Or. 367, 667 P.2d 509, 512-16 (1983); State v. Clark, 291 Or. 231, 236-46, 630 P.2d 810, 814-18 (1981).

[31] Hewitt v. State Accident Insurance Fund Corp., 294 Or. 33, 42, 653 P.2d 970, 975 (1982); see also Behrns v. Buake, 89 S.D. 96, 100, 229 N.W.2d 86, 89 (1975)("more stringent constitutional standard" than fourteenth amendment); Comment, *Willamette Law Journal* 19 (1983): 757 (discussing Hewitt).

[32] See State v. Freeland, 667 P.2d 509, 512 (1983); State v. Clark, 291 Or. 231, 237-38, 630 P.2d 810, 814-15 (1981).

[33] Linde, "Without 'Due Process,' " p. 142 notes 53 and 54.

[34] See In re Aston Park Hosp., Inc., 282 N.C. 542, 193 S.E.2d 729 (1973); Comment, "Hospital Regulation after Aston Park: Substantive Due Process in North Carolina," *North Carolina Law Review* 52 (1974): 763.

[35] See James Quale Dealey, *Growth of American State Constitutions from 1776 to the End of the Year 1914* (New York: DaCapo Press, 1972, 1915 reprint) pp. 224-26; Hurst, *The Growth of American Law*, pp. 241-42; Thomas and Thomas, "The Texas Constitution," 915.

[36] See, for example, Florida Constitution, Art. III, 11(a)(1) (1968); Pennsylvania Constitution, Art.III, 32

[37] See generally City of Louisville v. Klusmeyer, 324 S.W.2d 831. 833-34 (Ky. 1959) (noting that both territorially and substantively "special" statutes are permissible in certain cases). The Tennessee Constitution's "law of the land" provision, Tennessee Constitution, Art. XI, 8 (1796) has been interpreted to allow statutes to be restricted to certain counties by population classification only when "the classification is based upon reason, is natural and not arbitrary or capricious." State ex rel Hamby v. Cummings, 166 Tenn. (2 Beeler) 460, 463, 63 S.W.2d. 515, 516 (1933).

[38] Illinois Constitution, Art. IV, 13 (1970); see Grace v. Howlett, 51 Ill. 2d 478, 283 N.E.2d 474 (1974). Illinois' "special laws" provision declares further that "whether a general law is or can be made applicable shall be a matter for judicial determination." Illinois Constitution, Art. IV, 13 (1970). On judicial enforcement of this type of provision, see Truax-Traer Coal Co. v. Compensation Commissioner, 123 W. Va. 621, 626-27, 17 S.E.2d 330, 334 (1941); Thomas F. Green, Jr., "A Malapropian Provision of State Constitutions," *Washington University Law Quarterly* 24 (1939): 359; Frank E. Horack, "Special Legislation: Another Twilight Zone," *Indiana Law Journal* 12 (1936): 110-21.

[39] Illinois Constitution, Art. I, 2 provides: "No person shall. . . be denied the equal protection of the laws."

[40] See Karasik, "Equal Protection," pp. 270-74.

[41] Grace v. Howlett, 51 Ill. 2d 478, 487 283 N.E.2d 474, 479 (1974).

[42] Pennsylvania Constitution, Art. I 26 (1967); cf. New York Constitution, Art. I. 11 (1938) (earlier version of this type of provision). For discussion of similar provisions in other state constitutions, see Albert L. Sturm, "The Development of American State Constitutions," *Publius: The Journal of Federalism* 12 (1982): 87-88; Albert L. Sturm and Kaye M. Wright, "Civil Liberties in Revised State Constitutions," in Stephen L. Wasby, ed., *Civil Liberties: Policy and Policy Making* (Carbondale: Southern Illinois University Press, 1976), pp. 182-83.

[43] See, for example, New Jersey Constitution, Art. I, para 5 (1947).

[44] See Hurst, *The Growth of American Law*, p. 246. See generally Charles Press, "Assessing the Policy and Operational Implications of State Constitutional Change," *Publius: The Journal of Federalism* 12 (1982): 108-11 (discussing the politics of constitutional revision).

[45] 448 U.S. 297 (1980).

[46] This was a Fifth Amendment equal protection case dealing with a federal statute. The companion case, Williams v. Zbaraz, 448 U.S. 358 (1980), applied identical analysis to a state statute under the equal protection clause of the Fourteenth Amendment.

[47] Williams v. Zbaraz, 315-17.

[48] Ibid., 317 n.19.

[49] Roe v. Wade, 410 U.S. 113 (1973).

[50] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[51] This argument, which contends that such *federal* constitutional rights constitute "civil rights" under the *state* constitutional provision, was rejected in Fischer v. Department of Public Welfare, 509 Pa. 282, 502 A. 2d 114 (1985).

[52] See generally Frank P. Grad, "The State Constitution: Its Function and Form in Our Time," *Virginia Law Review* 54 (1968): 929-939 (describing the shifting functions of state governments).

[53] Of course, many states did not enforce even these earlier provisions in the area of, for example, racial discrimination.

[54] Laurence H. Tribe, *American Constitutional Law* (Mineola, New York: Foundation Press, 1978) 15-10, p. 933 n.77. For a complete discussion of unconstitutional conditions, see Seth Kreimer, "Allocational Sanctions: The Problem of Negative Rights in a Positive State," *University of Pennsylvania Law Review* 132 (1984): 1293.

[55] 62 N.J. 473, 513, 303 A.2d 273, 294, cert. denied, 414 U.S. 976 (1973).

[56] New Jersey Constitution, Art. VIII, 4, para 1 (1947); see Gershon M. Ratner, "A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills," *Texas Law Review* 63 (1985): 815 n. 144; Paul L. Trachtenberg, "Reforming School Finance through State Constitutions: Robinson v. Cahill Points the Way," *Rutgers Law Review* 27 (1974): 415-28.

[57] See Cahill, 62 N.J. 501-10, 303 A.2d 287-92. For a decision dealing with equality of educational opportunity for handicapped students under New Jersey's "thorough and efficient" provision, see Levine v. State Department of Institutions and Agencies, 84 N.J. 234, 418 A.2d 229 (1980); see also In re G.H., 218 N.W.2d 441, 446 (N.D. 1974) (holding that failure to provide free education to handicapped children violates North Dakota Constitution's education and equality provisions).

[58] The New Jersey court said: "In passing we note briefly the reason why we are not prepared to accept that concept for State constitutional purposes. We have no difficulty with the thought that a discrimination which may have an invidious base is "suspect" and will be examined closely. And if a discrimination of that kind is found, the inquiry may well end, for it is not likely that a State interest could sustain such a discrimination. But we have not found helpful the concept of a "fundamental" right." Cahill, 62 N.J. 491, 303 A.2d 282.

[59] Ibid., 62 N.J. at 492, 495-96, 303 A.2d at 283, 284. In fact, New Jersey has no "equal protection" clause in its constitution. The general state constitutional doctrines of equality arise from New Jersey Constitution, Art. I, para. 1 (1947). See supra note 5.

[60] See generally Michael M. Bernard, *Constitutions, Taxation and Land Policy*, 2 vols. (Lexington, Massachusetts: D.C. Heath, Lexington Books, 1979, 1980) (abstracting tax provisions from the federal and all state constitutions); Wade J. Newhouse, *Constitutional Uniformity and Equality in State Taxation*, 2nd ed. (Buffalo: William S. Hein Co., 1984) (analysis of state tax uniformity and equality provisions, organized into nine prototypical clauses); William L. Matthews, Jr., "The Function of Constitutional Provisions Requiring Uniformity in Taxation," *Kentucky Law Journal* 38 (1949): 31 (discussing the development and application of state tax uniformity provisions); David A. Myers, "Open Space Taxation and State Constitutions," *Vanderbilt Law Review* 33 (1980): 837 (differential taxation of farm, timber, and open space land tends "both to countermand and to reinforce the ideal that absolute equality in state taxation can be attained").

[61] See, for example, Gottlieb v. City of Milwaukee, 33 Wis. 2d 408, 147 N.W. 2d 633 (1967).

[62] See Note, "Inequality in Property Tax Assessments: New Cures for an Old Ill," *Harvard Law Review* 75 (1962): 1377-80; Note, "The Road to Uniformity in Real Estate Taxation: Valuation and Appeal," *University of Pennsylvania Law Review* 124 (1976): 1447.

[63] See Lenhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973); Allied Stores, Inc. v. Bowers, 358 U.S. 522, 526 (1959); Nashville, Chattanooga, and St. Louis Railway v. Browning, 310 U.S. 362, 368 (1940) (referring to the "narrow and sometimes cramping provision of . . . state uniformity clauses").

[64] Amidon v. Kane 444 Pa. 38, 47, 279 A.2d 53, 58 (1971).

[65] Federal initiatives include passage of the *Equal Pay Act of 1963* (57 U.S.C. 206 [1976]), the *Civil Rights Act of 1964* (42 U.S.C. 2000e [1976 and Supp. III 1979]), and Title IX of the *Education Act Amendments of 1972* (20 U.S.C. 1681 [1976]) as well as Reed v. Reed 404 U.S. 71 (1971) and subsequent judicial rulings under the equal protection clause of the Fourteenth Amendment. State initiatives include not only the constitutional guarantees of gender equality discussed below but also statutory reforms and judicial decisions demonstrating a commitment to securing gender equality even in the absence of express constitutional mandates. See, for example, Sailer Inn v. Kirby, 485 P.2d 529 (Cal. 1971).

[66] For a thorough overview of the changes in state law, see Barbara A. Brown, Ann E. Freedman, Harriet N. Katz, and Alice M. Price, *Women's Rights and the Law: The Impact of the ERA on State Laws* (New York: Praeger, 1977).

[67] Alaska Constitution, Art. I, 3 (1972); California Constitution, Art. I, 8 (19); Colorado Constitution, Art. II, 29 (1972); Connecticut Constitution, Art. I 20 (1974); Hawaii Constitution, Art. I, 3, and Art. I, 5 (1972); Illinois Constitution, Art. I, 18 (1971); Louisiana Constitution, Art. I, 3 (1974); Maryland Constitution, Art. 46 (1972); Massachusetts Constitution, Part First, Art. I (1976); Montana Constitution, Art. II, 4 (1973); New Hampshire Constitution, Part First, Art. 2 (1975); New Jersey Constitution, Art. I, para. 1 (1947); New Mexico Constitution, Art. II, 18 (1973); Pennsylvania Constitution, Art. I, 28 (1971); Texas Constitution, Art. I, 3a (1972); Utah Constitution, Art. IV, 1 (1896); Virginia Constitution, Art. I, 11 (1971); Washington Constitution, Art. 31, s 1 and 2 (1972); and Wyoming Constitution, Art. VI, 1, and Art. I, 3 (1890). Litigation and legislative action under these provisions through 1980 are surveyed in NOW Legal Defense and Education Fund, *ERA Impact Project* (unpublished, 1981).

[68] The revised provision substituted "persons" for "men." The aim of securing equal rights through this change is documented in "Note: Rediscovering the New Jersey E.R.A.: The Key to Successful Sex Discrimination Litigation," *Rutgers Law Review* 17 (Winter 1986): 253.

[69] See, for example, McLean v. First N.W. Industries of America, Inc., 600 P.2d 1927 (Wash. 1979), and Junior Football Association v. Gaudet, 546 S.W.2d 71 (Tex. Civ. App. 1976).

[70] See, for example, People v. Ellis, 311 N.E.2d 98 (Ill. 1974). For a contrary view, see Hartford Accident and Indemnity v. Insurance Commissioner, 482 A.2d 542 (Pa. 1984).

[71] Salt Lake City v. Wilson, 148 P. 1104 (Ut. 1915), and Stanton v. Stanton, 517 P.2d 1010 (Ut. 1974).

[72] Consortium is defined as the "[c]onjugal fellowship of husband and wife, and right of each to the company, society, cooperation, affection, and aid of the other in every conjugal relation." (*Black's Law Dictionary*, 5th ed. [St. Paul: West Publishing Co., 1979], p. 280) Traditionally, under common law a husband could recover for negligence leading to an impairment or loss of the consortium of his spouse, but a wife could not. Darrin v. Gould, 540 P.2d 885 (Wash. 1975); Rand v. Rand, 374 A.2d 900 (Md. 1977); and Hopkins v. Blanco, 320 A.2d 139 (Pa. 1974).

[73] Henderson v. Henderson, 327 A.2d. 60 (Pa. 1974); Smith v. Smith, 534 P.2d 1033 (Wash. 1975); Cooper v. Cooper, 513 S.W.2d 229 (Tex. Civ. App. 1973); Friedman v. Friedman, 521 S.W.2d 111 (Tex. Civ. App. 1975); and Kremp v. Kremp, 590 S.W.2d 229 (Tex. Civ.App. 1979).

[74] The relevant cases, in both "little ERA" and "non-ERA" states, are surveyed and analyzed in G. Alan Tarr and Mary Cornelia Porter, "Gender Equality and Judicial Federalism: The Role of State Appellate Courts," *Hastings Constitutional Law Quarterly* 9 (Summer 1982): 942-950 and 963-973, Tables E-H.

[75] See, for example, People v. Barger, 550 P.2d 1281 (Col. 1976); Finley v. State, 527 S.W.2d 553 (Tex. Crim. App. 1975); and Brooks v. State, 330 A.2d 670 (Md. 1975).

[76] See, for example, Hopkins v. Blanco, 302 A.2d 855 (Pa. 1973); Whittlesey v. Miller, 572 S.W.2d 665 (Tex. Civ. App. 1978); and Lundgrens v. Whitney's Inc., 614 P.2d 1272 (Wash. 1980). For discussion of state elimination of the discriminatory common-law ban on recovery, see Tarr and Porter, "Gender Equality," pp. 937-942.

[77] See, for example, Packel v. Pennsylvania Interscholastic Athletic Association, 334 A.2d 839 (Pa. 1975), and Darrin v. Gould, 540 P.2d 885 (Wash. 1975).

[78] For example, whereas in Texas the right of married women to revert to their birth names on official records was confirmed by judicial decision, in Maryland and Pennsylvania the issue was resolved by opinions issued by the states' attorneys general. For Texas, see In re Erickson, 547 S.W. 2d 357 (Tex. Civ. App. 1977); for Maryland, see 57 Opinions of the Attorney General 234 (11/30/72), cited in NOW Legal Defense and Education Fund, *ERA Impact Project: Summary—Maryland State ERA Experience*, pp. 7-8; and for Pennsylvania, see Official Opinion No. 62, Opinions of the Attorney General 172 (8/20/73), cited in NOW Legal Defense and Education Fund, *ERA Impact Project: Summary—Pennsylvania State ERA Experience*, pp. 11-12.

[79] Connecticut prohibited gender discrimination by private employers in 1967 and by public employers in 1969 (Connecticut Gen. Stats. 4-61, 31-12, and 53-35 [1979 Rev.]). A year prior to the adoption of the state ERA in 1973, the state had made gender neutral all laws concerning divorce, marriage, alimony, division of property, custody, and child support (Connecticut Gen. Stat. 46b-40 et seq. [1979 Rev.]). It should be noted that many states that did not adopt constitutional prohibitions on gender discrimination nonetheless acted to remove discriminatory provisions from their laws. See Brown et al., *Women's Rights and the Law*, chapter 3.

[80] This account of New Mexico's reform effort is based on NOW Legal Defense and Education Fund, *ERA Impact Project: Summary—New Mexico State ERA Experience*, pp.8-13.

[81] For example, two months after the Virginia Supreme Court in Archer v. Mayes, 194 S.E.2d 707 (Va. 1973), upheld an automatic exemption from jury duty offered only to women, the Virginia Legislature replaced the statute with one offering an exemption to anyone who is responsible for the care of a child or a handicapped adult (Virginia Code 8.01-341.1 [Rep. Vol. 1977).

Chapter 6

The States and Criminal Procedure

Rights protections for defendants in criminal cases represent another area where state courts have become very active in recent years. State courts are often holding that a defendant is afforded more protection under a section of a state constitution than the U.S. Supreme Court has granted through its interpretation of the corresponding provision in the U.S. Bill of Rights. This development has resulted, in part, from the changes in the substance of U.S. Supreme Court decisions. Under Chief Justices Warren Burger and William Rehnquist, the Court has slowed the expansion of criminal defendant rights and, in some areas, narrowed the protections granted to the defendant under the U.S. Constitution by the Warren Court.[1]

Because of the Supreme Court's post-Warren approach to defendant rights, the state courts are taking initiatives in this field. Justice William Brennan approves of these state initiatives. He finds that "state courts no less than federal are and ought to be the guardians of our liberties."[2] In the past, when defendants' rights were federalized, the states had no reason to consider their own state constitutions. However, the Burger/Rehnquist Court does not interpret these rights as expansively as did the previous Court.

This chapter will demonstrate that, despite several problems, state courts have turned to their own constitutions to guarantee more protection than the Supreme Court's interpretation of the U.S. Constitution grants to the defendant. State courts may and do interpret their constitutions independently of the federal Constitution. State constitutions are not mirrors of the federal Constitution; they have their own language and history, which shape state court interpretation.

In order to avoid Supreme Court review and possible reversal, state courts must make a plain statement that their decision is based on an independent and adequate state ground and note that while federal law may persuade the court it does not compel the result. This chapter focuses on the exclusionary rule of the Fourth Amendment to the U.S. Constitution. This rule has become central to the American criminal justice system. This rule is also important for federalism because, even if a state court is able to use state grounds as the basis of its decision, a federal court may still be able to use the evidence that was suppressed in the state court. The U.S. Supreme Court has held that successive prosecutions in state and federal courts are not violative of the double jeopardy clause of the Fifth Amendment.

The defendant can attempt to stop the federal court from using evidence that is impermissible under the state constitution even if he or she cannot avoid the federal prosecution. The state court might be able to enjoin the state official, who obtained the evidence in violation of state rules, from testifying or handing the evidence over to the federal prosecutor. The state court might be able to prohibit the introduction of evidence from a federal official who violated the state constitution through the "reverse silver platter doctrine." In addition, the defendant can make his or her argument to the federal court. If the state court is hesitant to act, the federal judge may rule that the federal officials should not receive evidence that a state official obtained in violation of state law. The federal court can also decide to prohibit state officials from using evidence seized contrary to state law in the federal prosecution.

State Courts and Constitutions

Several commentators assert that the states should take the initiative in the area of constitutional rights. Ronald Collins, for example, maintains that the states must take responsibility to protect individual rights in order to revitalize federalism.[3] For Justice William Brennan, the federal courts are still primarily responsible for protecting individual rights, but the states should take the role of expanding protections beyond federal guarantees.[4] He believes that James Madison would have approved and welcomed the increase in the reach of state constitutional law.[5] Perhaps, as one commentator suggests, the state rule should simply act as an alternative to federal law because the states are as able as the federal courts to formulate workable rules for the application of the standard formulated by the Supreme Court.[6]

However, some observers argue that the state courts should not interpret their constitutions in a manner different than the Supreme Court's understanding of the U.S. Constitution. As Chief Justice Burger stated in *Florida* v. *Casal*,

> . . . when state courts interpret state law to require more than the Federal Constitution requires, the citizens of the state must be aware that they have the power to amend state law [by referendum in that case] to ensure rational law enforcement.[7]

Problems may arise, like those in the pre-*Mapp* era before the exclusionary rule was applied to the states uniformly. Two rules of law will exist in each state; one federal and the other state. More cases may arise due to this lack of uniformity between states and the federal government. However, since each state has unique interests, complete uniformity may not be required or desirable.[8]

Further, there is a custom of looking to federal law for the protection of the defendant. Because courts are accustomed to federal rules, the state judges usually defer to the Supreme Court's interpretation. However, such deference is not necessarily appropriate. Although the U.S. Supreme Court receives the most attention, state courts have often guaranteed particular protections to defendants before the Supreme Court has done so.[9]

Another problem that can arise is confusion about which rule of law, state or federal, must be followed in a case. Nonuniformity causes difficulties in instructing law enforcement officers in their duties. In many states, the law enforcement officers may find that their duties change when the state court decides to interpret the state constitution more narrowly than the federal Constitution, which had been followed before.

However, state courts are no longer performing any service when they interpret their state constitutions as equal to the federal Constitution because the Fourteenth Amendment applies most of the protections of the U.S. Constitution to the states. State courts must use the state constitutions as documents granting more protections to the criminal defendant in order to make a contribution to the law.[10] The state court must make an independent determination in each case.[11]

The state courts' practice of deciding issues on the basis of state constitutional law before reaching federal law is useful for several reasons. First, the state court will avoid adjudication of federal constitutional questions unless it is necessary.[12] Second, state courts are better suited to decide state than federal questions. Third, state adjudication on state grounds takes some pressure off the heavy Supreme Court docket because the Court cannot decide state law issues.[13] Fourth, the state court can make its decisions based on the character of the state where it sits. The state can grant benefits to a state defendant due to the capabilities of the state, such as counsel on appeal, while the Supreme Court must be sure that all states can afford to enact this provision.[14] The states are free to experiment[15] and determine the best procedures and laws for their unique circumstances.

Thus, although the state court's use of its own constitution may cause some problems, these problems do not outweigh the benefits. No other body can so easily and efficiently protect rights owed to the defendant under state law. Because many state courts are becoming active,[16] it is now the duty of attorneys in each state to raise and brief the issues based on state constitutions. Local practitioners have an obligation to raise the issue that the state court can grant broader protection under its own constitution, so that the client and future defendants can receive the benefits of those rights. Yet, as the Vermont court stated in *State* v. *Jewett*, the state court should not "use its state constitution chiefly to evade the impact of the decisions of the U.S. Supreme Court. Our decisions must be principled, not result oriented."[17]

State Use of Their Own Constitution

In the first appeal after *Michigan* v. *Long*[18]—*Colorado* v. *Nunez*[19]—the U.S. Supreme Court dismissed the case as improvidently granted because it rested on independent and adequate state law grounds. The state court[20] decided that the Colorado Constitution grants a trial court discretion to disclose the identity of informants when there is a reasonable factual basis to question the informant's statements, even though the U.S. Supreme Court did not hold that the federal Constitution requires this disclosure.[21] Thus, the Supreme Court, in dismissing *Nunez*, permitted the state court to go beyond what was necessary under the U.S. Constitution.

In a concurrence, Justice John Paul Stevens criticized Justice White's opinion. White agreed that the Court had no jurisdiction, but he proceeded with a lengthy advisory opinion. For Stevens, White's opinion simply demonstrated the Court's tendency to involve itself in state court proceedings and encourage litigants to file writs of certiorari. A party may hope for advisement by some of the justices, even if the state decision is based on state grounds.[22]

In *Turner* v. *City of Lawton*,[23] the Oklahoma court held that its constitution does not permit the introduction of evidence in a civil case that would be impermissible in a criminal case, although the federal Constitution may allow such civil use.[24] For the U.S.

Supreme Court, the exclusionary rule is simply a judicially created remedy for Fourth Amendment violations. In Oklahoma, however, the exclusionary rule was incorporated in the state constitution as a fundamental right before it was imposed on the states[25] by the U.S. Supreme Court in *Mapp* v. *Ohio*.[26]

Under the Oklahoma Constitution, which has language different and broader than the United States Constitution, the exclusionary rule is a constitutional right. The state court also found that another justification for the stricter state rule is that exclusion of the evidence in civil as well as criminal cases will further deter illegal searches and seizures. The same city law enforcement officers were trying to use the evidence in both situations.[27] The state should be permitted to make its own determination of the best rule for its jurisdiction as long as the federal constitutional standard is met.

Third, in *State* v. *Koppel*,[28] the New Hampshire Supreme Court found that the state constitution provides greater protection for motor vehicles than the Fourth Amendment.[29] The court ruled that roadblocks for drunk driving are seizures and are not permissible in the state, even though the U.S. Supreme Court may decide that the U.S. Constitution allows them.[30] The state court determined that the public benefit of eliminating drunk driving is not sufficiently well served to outweigh the intrusion on individuals. The state court wisely declined even to address the federal issue since it decided the case on state grounds.

In a fourth case, *State* v. *Jones*,[31] the Alaska Supreme Court rejected the less protective "totality of the circumstances" test of *Illinois* v. *Gates*[32] for the flexible probable cause standard of *Aguilar-Spinelli*.[33] The Alaska courts have not been persuaded by the Supreme Court's reasoning in *Gates* and, therefore, continue to follow the earlier test under *Aguilar* and *Spinelli*. The state court increased the protection of the criminal defendant by requiring that both factors of the test for probable cause—reliability and basis of knowledge—must be met, even if the U.S. Supreme Court did not hold that a finding of both is constitutionally required.[34]

Finally, in *State* v. *Novembrino*,[35] the New Jersey Supreme Court rejected the good faith exception to the warrant clause as decided by the U.S. Supreme Court in *United States* v. *Leon*.[36] The court excluded evidence based on an invalid warrant, which a law enforcement officer had relied on in good faith. The state court found that the good faith exclusionary rule would undermine the probable cause requirement and that an officer's suspicion and good faith are not enough, at least in New Jersey.[37]

For the U.S. Supreme Court, the exclusionary rule is not a constitutional right, but a judicially created remedy. The U.S. Supreme Court eroded the exclusionary rule significantly in the *Leon* exception. However, the New Jersey court held that under its constitution, a source of individual liberties more expansive than the federal Constitution,[38] the state right which corresponds with the Fourth Amendment is a very important right. "The exclusionary rule, by virtue of its consistent application over the past 25 years, has become an integral element of our state constitutional guarantee."[39] The state court found that the federal constitutional rule would reduce compliance by law enforcement officers with probable cause.[40]

Not many cases are dropped simply because some evidence is excluded, though in some states a good faith exception may be necessary. In New Jersey, however, the court found that the exclusionary rule does not impair law enforcement.[41] Finally, since the court surmises that, as Justice Harry Blackmun said, the *Leon* exception probably will not be permanent,[42] New Jersey does not have to experiment with procedures that produce uncertain effects when a state constitutional right is at stake.[43] Although state and federal uniformity is often good, it is not essential.

State Courts' Reliance on Federal Law

Before *Michigan* v. *Long*,[44] the Supreme Court usually assumed that the state court was relying on state rather than federal law. Historically, state courts could rely on their own constitution as a source of rights greater than those granted by the federal court. Only in this century has the U.S. Supreme Court assumed the authority to review a state court judgment that protects a federal right. The Court could only review those cases that held against a federal claim in favor of state law.[45]

However, in *Michigan* v. *Long*, Justice Sandra Day O'Connor wrote for the Court that:

> . . . in determining . . . whether we have jurisdiction to review a case that is alleged to rest on adequate and independent state grounds, . . . we merely assume that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law.[46]

In a footnote, the Court explained its holding. The Supreme Court should not take jurisdiction if one of two grounds of a state court decision is based on independent and adequate state grounds.[47] The federal court may take jurisdiction if: (1) the case is decided on the federal ground despite the availability of an adequate state ground, and (2) the state court felt compelled to follow federal constitutional considerations or the state and federal grounds are interwoven.

Although the Supreme Court should respect state jurisdiction because of both the inability of the Court to construe state law and the respect due to state courts in a federal system, the Court will presume that it has jurisdiction. To avoid federal review, the state court must include a "plain statement" that the state court is basing its decision on independent and adequate state grounds. Federal precedents are used only as guidance and do not compel the decision.[48]

The Vermont court in *State* v. *Jewett*[49] instructed local practitioners to rely on state law rather than on federal law. The court warned that in order to avoid federal jurisdiction, the states should not use federal cases that compel the result. A state court may use federal decisions only for their persuasive value, like decisions from other states.[50] If the state court opinion relies too heavily on federal precedent, the U.S. Supreme Court in review might find that it has jurisdiction, even though the state court plainly states that its decision is based on independent and adequate state grounds.

The U.S. Supreme Court may hold that the state court's reliance on federal precedent in a particular case is misguided and, therefore, reverse the decision if the state's use of independent and adequate state grounds is not clear. In *Florida* v. *Meyers*,[51] the appellate state court reversed the trial court conviction potentially on two grounds.[52] The first was a restriction on cross examination under state law, which was not challenged on appeal. The second was the use of evidence obtained in an automobile search.[53]

In the U.S. Supreme Court's summary *per curiam* opinion, the issue of independent and adequate state grounds is addressed in a footnote. The Court finds that the state court made no "clear indication" that the issue of cross examination was an adequate ground for reversal, independent of the suppression of the evidence obtained in an automobile search.[54] Over the strong dissent of Justice Stevens, the Court held that the search of the automobile was proper under the Fourth Amendment and reversed the state court.[55]

Stevens asserted that the Court should not have granted certiorari. He noted that since 1981 the Court had summarily reversed lower court decisions upholding constitutional rights 19 times. Stevens stressed that the Court should be "ever mindful of its primary role as the protector of the citizen and not the warden or the prosecutor."[56] Therefore, states must base their decisions clearly on state constitutional grounds to protect state defendants. If federal law is used, the Supreme Court is likely to reverse the decision, possibly with only a summary proceeding.

Similarly, in *Massachusetts* v. *Upton*,[57] the Supreme Court, in another per curiam opinion, found that the court in the Commonwealth misunderstood the definition of probable cause, which the Court articulated in *Illinois* v. *Gates*.[58] *Gates* set out a flexible "totality of the circumstances" test that overruled the two-pronged *Aguilar-Spinelli* test. The U.S. Supreme Court overruled the judgment of the state court.

Justice Stevens, this time in a concurrence, agreed with the reversal because the state court did not express whether the warrant was valid and supported by probable cause under the Massachusetts Constitution. He suggested that if Massachusetts were to find the warrant under state law to be in violation of its constitution on remand, then the first opinion, in which the court incorrectly pursued federal law, was worthless and insufficient.[59] This was precisely what occurred in that case.

The state should look to state law and the state constitution before it turns to the U.S. Constitution. According to the Ninth Amendment, rights are retained by the people of the state and are protected by the state constitution. The state court must guard the liberties of the citizens of the state and may exceed the rights granted under the U.S. Constitution.[60]

Many state courts are able to grant the defendant greater protections than the U.S. Supreme Court's interpretation of the U.S. Constitution on remand by explicitly relying on a state ground to obtain a different result. In *Commonwealth* v. *Upton*,[61] for example, the Massachusetts Supreme Judicial Court decided that its constitution exceeded the protection of the defendant granted by the Fourth Amendment probable cause standard. The court stated that: "The Constitution of the Commonwealth preceded and is independent of the Constitution of the United States."[62] The two constitutions have different language, and the courts have found different results and understandings of constitutional doctrine under the two documents.

The Massachusetts Court has realized in the past that it may protect the defendant more thoroughly under the state than the federal Constitution.[63] It held that the *Aguilar-Spinelli* test sets a clear and comprehensible standard, encourages careful work by the police, and reduces the number of unreasonable searches in Massachusetts. The court decided that this standard should be maintained in the Commonwealth and is required by the Constitution of Massachusetts.[64]

In *State* v. *Neville*,[65] the South Dakota Supreme Court held that it could suppress, under the state constitution, evidence of a potentially intoxicated driver's refusal to take a blood alcohol test. Although the U.S. Supreme Court has decided that refusal is admissible under the Fifth Amendment of the U.S. Constitution,[66] the state, acting as the final arbiter of the state constitution, can grant the defendant more rights than the U.S. Constitution. The court determined that the federal cases did not control its determination. The words of the state constitution concerning the privilege against self-incrimination are different and broader than the words in the Fifth Amendment.[67] The refusal to submit to the test is not an admissible physical act, but is a communication that must be protected.[68] The court, therefore, suppressed the evidence.

In addressing state laws and constitutions, however, state courts must be careful. They should use federal precedent explicitly only for its persuasive value and state plainly that they are relying on aspects of their own state constitution rather than the U.S. Constitution.

Nevertheless, even if the state court specifically states that it is using the state constitution, the U.S. Supreme Court may find that the ground is not completely adequate or independent and, therefore, reverse the decision. In a large number of cases in which state courts have protected a defendant's rights more fully than the Court's interpretation of the U.S. Constitution, the Supreme Court has reversed in per curiam opinions. However, the Supreme Court may be forced to accept state court interpretations of their own constitutions if there is a plain statement, as required by *Michigan* v. *Long*, and if there is no real reliance on a federal precedent that requires the decision.

If the state court fails to rely solely on state law in its first opinion, the state court may reverse the decision on remand from the U.S. Supreme Court by relying explicitly on independent and adequate state grounds. In response to this action, the Supreme Court has reversed some cases that had protected the defendant without remand to the state court.[69] Therefore, if a state court wishes to have its ruling stand, the state should rely on its own constitution in the first place, not only to avoid repetitious litigation, but also to avoid the problem in *Gates*.

State and Federal Prosecutions

Even if a state court bases its decisions on state constitutional grounds that are adequate and independent of the U.S. Constitution, the federal courts in the state may still use the evidence that is suppressed in the state court under the less restrictive federal rule. In two cases decided on the same day, the Supreme Court, in *Bartkus* v. *Illinois*[70] and *Abbate* v. *United States*,[71] did not deny the state and federal governments the power to prosecute the same act.

In *Bartkus*, the defendant was tried and acquitted in federal district court. Then the federal agents gave the evidence to the officials of the state of Illinois, who proceeded to convict the defendant for the same acts under a state statute.[72] As the U.S. Supreme Court stated in *Moore* v. *Illinois*, "the same act may be an offence or transgression of the laws of both"[73] the state and federal sovereigns. The Court held that the double jeopardy clause of the Fifth Amendment did not preclude the second prosecution by the state.[74] Under *Bartkus*, successive state and federal prosecutions are not in violation of the Fifth Amendment.[75]

In another case, *Abbate* v. *United States*,[76] the state of Illinois prosecuted and convicted a defendant for violation of a state statute. Then, the federal district court in Mississippi prosecuted the defendant for a violation of a federal statute for the same acts.[77] This situation is the opposite of that in *Bartkus*. The Supreme Court relied on *United States* v. *Lanza*,[78] which held that the state conviction did not preclude the second federal suit. The Court recognized that if the state prosecution barred federal prosecutions for the same acts, "federal law enforcement must necessarily be hindered."[79] This is particularly dangerous when the defendant's behavior impinges on the federal interest more than that of the state.

These two cases illustrate that the Supreme Court will uphold prosecution of the same act in the courts of different sovereigns. Thus, if the state court were to hear the case of the defendant and make its decision based on independent and adequate state grounds, the federal court may still hear the case under a federal statute. According to *Abbate* and *Lanza*, after the state court granted the defendant protection greater than the safeguards in the U.S. Constitution, the federal court can try the same defendant for the same acts and convict him by using the evidence that was not permissible in state court.

However, the Court in *Bartkus* noted that many states have statutes that bar a second prosecution after the defendant has been tried by a separate sovereign for the same actions.[80] State and federal officials may decide that the statutes under which the defendant is prosecuted are so similar that a second suit is not warranted or necessary, even though it is not prohibited. The federal government may decide that the federal statute is so much like the statute that the state used to prosecute the defendant that the federal suit should not proceed. Perhaps the expense of the second trial should not be incurred because the defendant is being punished by the state or has received an acquittal after a fair trial. The defendant could argue this point to the federal prosecutor and to the federal judge as grounds for dismissal.

Federal prosecutors have adopted this policy pursuant to the case of *Petite* v. *United States*.[81] In response to *Bartkus* and *Abbate*, the U.S. Department of Justice adopted a policy that "a federal trial following a state prosecution for the same act or acts is barred unless the reasons are compelling."[82] In *Rinaldi*, the U.S. Supreme Court enforced the Justice Department's policy that bars the second prosecution. The Supreme Court dismissed the federal indictment and left the state conviction and sentence intact.

Under this policy as enforced by the courts, a defendant who is first tried in a state court may be able to avoid a federal suit where the evidence, which would be precluded under the more protective state constitution, could be used. The defendant can argue that the Justice Department policy does not allow the second prosecution and that the court must enforce this policy. The problem is that the Justice Department can change its policy. The court cannot require the department to keep this policy. If the department abandons its policy, a defendant may again be faced with two indictments and trials.

A majority of the present U.S. Supreme Court would appear to limit the protections granted to defendants in criminal cases. This has led the Court to admit evidence to convict defendants who were protected by a state court that did not specify its reliance on state law. The Supreme Court has even decided cases without remand in order to avoid state reversal under state law. There is reason to believe that the U.S. Supreme Court will continue to permit federal courts to grant less protection to defendants in second prosecutions. The lower courts can take many cases which the Supreme Court as a single body cannot hear.

As recently as 1985, the Supreme Court held that the double jeopardy clause does not bar a second prosecution of a defendant for the same acts in a court with a different sovereign than the first. *Heath* v. *Alabama* approved two prosecutions for the same acts in different states.[83] The Court did not question the fact that consecutive state and federal suits are permissible. A defendant must argue that the second suit should not take place on the grounds of respect for the state court, efficiency, and the wisdom of the doctrine that a defendant should not be twice convicted for the same crime. However, it is doubtful that the federal court is prohibited from hearing the suit.

Avoiding Federal Use of Evidence

State Courts

If a defendant and the state cannot avoid federal prosecution, then federal officials may be unable to use the evidence that was inadmissible under the state constitution. In *Rea* v. *United States*,[84] the Supreme Court permitted the federal courts to issue injunctions against federal agents to prevent them from giving evidence to the state officials. The Court approved of the action of the district court in enjoining a federal official because the relief was not against any state activity, but only against a federal agent who abused his authority. As the Court said, "to enjoin the federal agent from testifying is merely to enforce the federal rules against those owing obedience to them."[85] It was unimportant that the state might condone the procedure prohibited by the federal rule. The federal agent could not be allowed to flout the rules that he had the duty to follow.[86]

Similarly, perhaps the state courts could limit the activity of state agents. The state courts might be permitted to stop state agents from testifying or giving evidence to federal agents who could use this evidence in federal court. The fact that the procedure used by the state agent was proper under federal constitutional law would be irrelevant. The state court would simply be enforcing its own constitutional rules against the state agents who were bound to follow these rules. If the states could not enforce their rules on state agents, these agents could act as they pleased and violate constitutional rights of the defendants. The defendants would have no remedy.

In his dissent in *Rea*, Justice Harlan voiced his concern that a federal "injunction [against federal officials] will operate quite as effectively . . . to stultify the state prosecution as if it had been issued directly against New Mexico or its officials."[87] Even if the state enjoined only the activities of the state official, the injunction would, in effect, work against the federal suit. The state court would be able to prevent the prosecution of the federal case. This would awaken the concerns about enabling the sovereign with the greater interest in the case to hold the trial, even if the officers of the other sovereign discovered the evidence.

This problem is exacerbated when it is the state enjoining state officials and interfering with federal prosecutions. The state court could nullify federal law, which must be supreme to state law.[88] A state's nullification of a federal prosecution would turn the supremacy doctrine on its head: the state could often control the federal court by refusing to turn over probative evidence.

In *Wilson* v. *Schnettler*,[89] the U.S. Supreme Court reflected this concern for violation of a sovereign's power when it refused to enjoin the use of evidence illegally seized by federal officers in state court. After the defendant was indicted in an Illinois state court for possessing narcotics under a state statute, he filed a suit in the federal district court to impound the drugs and enjoin their use in the state trial. The defendant argued that the injunction should issue against the federal officials who seized the narcotics and who would be called to testify in the state's case. The defendant failed in the Supreme Court as well as the lower federal courts.

The decision was based on the rationale that courts of one sovereign must avoid interference with the courts of the other sovereign. Otherwise, embarrassing and threatening conflicts between state and federal courts would occur. If each court decided to enjoin the other's proceedings, litigants would be left without a remedy.[90] There would be no finality in the judgment of the first sovereign, which could be reversed in a new trial by the other.[91]

These ideas, voiced in *Wilson*, were applied in the later case of *Younger* v. *Harris*.[92] That case held that a federal court cannot enjoin an ongoing state criminal proceeding unless there is bad faith, harassment, or some other unusual circumstances.[93] Similarly, if the federal court begins its proceeding, the state court should not interfere, particularly because of federal supremacy. If the federal proceeding has not yet started, the defendant can argue that enjoining the federal officials is not forbidden and is appropriate.

However, there could occur a race to the court house between the defendant going to state court and the federal prosecutor going to federal court. In the federal system, however, the state court's supervisory power over the conduct of state officials with respect to violations of state laws might be more important than any inconveniences to the federal prosecutor. The vindication of a state constitutional right of exclusion of evidence outweighs the federal court's right to hear evidence obtained in violation of state law. One piece of evidence is not likely to cause the federal prosecutor to drop the suit.

The state court should have supervisory powers over state officials so as to ensure that the officers do not flout state constitutional law. In *City of Los Angeles* v. *Lyons*, the U.S. Supreme Court stated that the states "may permit their courts to use injunctions to oversee the conduct of law enforcement authorities on a continuing basis."[94] Thus, a state court should have no hesitation in supervising state personnel when that is clearly appropriate.

The state court can also attempt to enjoin a federal official against violation of state laws. There are many limitations on the power of state courts over federal officials. In *Tarble's Case*, the Supreme Court determined that the state court could not inquire about the validity of the enlistment of soldiers into the military.[95] Further, in *McClung* v. *Silliman*,[96] the Court determined that state courts could not issue a writ of mandamus against federal officials. Although the U.S. Supreme Court has never ruled explicitly that a state court could not enjoin a federal official, the Court would probably not allow such an action. The Supreme Court is likely to find that if the federal official obtained the evidence, the state court should not interfere with the federal court's jurisdiction.

The defendant could argue that the state court should be able to enjoin its officials, and even federal officials, from acting contrary to the rule enacted by the state courts. The federal officials should follow the state law while they are in the state, if the state law is more protective than the federal law. This would encourage state officers to act in accordance with state law.

However, this law would probably be too stringent for the federal officials. Federal officers would have to behave differently in each state, and there would be no uniform rules. Further, the state law is not supreme; the federal law overrules conflicting state laws. The federal government and officials are not bound by state laws.

The defendant may be able to enforce exclusion of the evidence obtained legally by federal agents, but which is contrary to the state exclusionary rule in the state court. The state can follow the theory behind *Elkins* v. *United States*[97] and eliminate the "reverse silver platter" problem that arises in such a situation. Given that *Elkins* held that evidence obtained by state officers in violation of the U.S. Constitution is inadmissible in the federal courts, evidence obtained by federal officers in violation of the state constitution should not be admitted in the state court. It would be internally inconsistent for the state court to use different rules depending on whether the officers are state or federal.

If a search is unreasonable and, therefore, violates the state constitution, the products should not be admitted in the state court, regardless of the actors. The victim of the search is harmed equally by state or federal officers. Although federal officers are not usually required to follow state law, the state court should not admit evidence that was obtained in violation of the constitutional rights of its citizens. The federal officers are not harmed because they probably will be able to use the evidence in federal court. The state does not interfere with federal law enforcement or federal courts.

Federal Courts

If the state court is hesitant to interfere with the actions of the federal court by enjoining its state personnel, the defendant can argue to the federal court that it should refuse to admit the evidence. The federal court could make an evidentiary ruling that the federal officials cannot receive evidence that a state officer obtained in violation of state law. Federal courts should not encourage state officers to violate their state laws. Further, the federal court may enhance this policy prohibiting the federal officers from admitting evidence which they obtained by a knowing violation of the state law where they are working.

A defendant could request an injunction against the state official in federal court to prohibit a handing over of illegally obtained evidence. Because the state actor acted in violation of the state constitution, the official should lose immunity from suit in federal court under *Ex Parte Young*.[98] The state officials must obey the U.S. Constitution; violations of neither one should be tolerated. The federal court should enjoin the state officers on state constitutional grounds.

However, this position has not been accepted by the U.S. Supreme Court. In *Pennhurst State School and Hospital* v. *Halderman*,[99] the Court refused to enjoin a state official for violation of state laws. Only the state court has power over state officials. Therefore, the lower federal courts will probably not enjoin the state officer in deference to *Pennhurst*.

In *United States* v. *Chavez-Vernaza*,[100] the federal court refused to encourage the state officers to follow carefully the state constitutional rules announced by state courts. In that case, Chavez wanted discovery of the manner in which state officials obtained evidence against him to determine if their activities violated state law. He claimed that if the evidence was seized in violation of state constitutional law, comity demanded that the federal court suppress it. The appellate court did not agree.

The Oregon court held that evidence is admissible in a federal court under federal standards. Following state law would hamper federal law enforcement by suppressing probative evidence.[101] However, the state constitutional rule would not hamper federal law enforcement significantly. Obviously, a state would not adopt a rule that would be impossible for its own law enforcement personnel to uphold. If the rule did not harm the state court's enforcement of the law, it is unlikely that a federal court in the state would find it unworkable.

For the *Chavez* court, uniformity among federal courts is more important than respect for the states. Although uniformity is a vital consideration, it does not outweigh the Constitution. A court would never assert that law enforcement officers could uniformly violate the U.S. Constitution. Federal courts should not sanction the violation of a state constitution by state officers. Uniform enforcement by the federal court of rules for federal agents will be maintained, while the state constitution is also upheld if the federal court suppresses the evidence.

Finally, the *Chavez* court asserted that if the state desires to discipline its officers, other means are available as sanctions.[102] However, although other sanctions exist, none seem to be as effective as the exclusionary rule. In dissent, Judge Harry Pregerson recognized that the federal court should defer to the state exclusionary rule because otherwise the state officers would be able to violate state constitutional law with impunity.[103] In *United States* v. *Henderson*,[104] the federal court reasoned correctly that the deterrence of a state exclusionary rule would be lessened if the state officer were permitted to introduce the evidence in a federal proceeding.

In *Elkins* v. *United States*,[105] the Supreme Court supported this policy of encouraging adherence to state law. The majority recognized that it must exclude the evidence in order to avoid conflict between state and federal courts. "When a federal court sitting in an exclusionary state admits evidence lawlessly seized by state agents, it not only frustrates state policy, but frustrates that policy in a particularly inappropriate and ironic way."[106] In dissent, Justice Felix Frankfurter agreed that state law is frustrated if the federal court does not suppress the illegally seized evidence. Thus the entire Court agreed that this evidence cannot be admitted.

Justice Frankfurter also asserted that the federal courts should not interfere with beneficial state procedures that assist the defendant by limiting the exclusion of evidence to the minimum in the U.S. Constitution. The state court cannot effectively discipline state officers for violations of state laws that are more protective than the U.S. Constitution. Frankfurter would hold that proper respect for the states demands that the state courts decide whether the evidence is admissible and that federal courts abide by this decision. This doctrine would be particularly applicable in a case where the state is more protective of the defendant under its constitution than the U.S. Constitution as interpreted by the U.S. Supreme Court.

Conclusion

State courts, perhaps with the help of federal courts, must try to ensure the state constitutional rights of state citizens. Many states are now granting defendants many rights that the Supreme Court has not found in the U.S. Constitution. The California courts were once the leaders of the crusade to have the state courts become the chief guardians of the liberties of defendants. However, the court's goals were thwarted when the citizens of the state voted in a referendum that the California Constitution is identical in meaning to the United States Constitution as interpreted by the U.S. Supreme Court.[107]

New Jersey, New York, and Connecticut are leading the eastern states in broad interpretation of their state constitutions. These states and many others are interpreting their constitutions beneficially for the defendant. Several western states, such as Alaska, Oregon, and Washington, are also leading in state constitutional interpretation.[108] Many states, however, have just begun to look toward their own constitutions, or have not yet attempted to use their own constitutions more broadly than the U.S. Constitution.[109]

NOTES

[1] See Ronald K.L. Collins, "Reliance on State Constitutions: Some Random Thoughts," in *Recent Developments in State Constitutional Law* (St. Paul: West Publishing Co., 1985), p. 13.

[2] William Brennan, "Guardians of Our Liberties—State Courts No Less than Federal," *Judges Journal* (Fall 1976): 83.

[3] Collins, p. 17.

[4] "Developments, The Interpretation of State Constitutional Rights," *Harvard Law Review* 95 (1982): 1329.

[5] Brennan, p. 103.

[6] "Note, State Constitutional Guarantees as Adequate State Ground: Supreme Court Review and Problems of Federalism," *American Criminal Law Review* 13 (Spring 1976) 737.

[7] 462 U.S. 637 (1983).

[8] William Greenhalgh, "Independent and Adequate State Grounds: The Long and the Short of It," in *Recent Developments in State Constitutional Law*, p. 36.

[9] Collins, p. 17. Collins notes that the Iowa Supreme Court upheld an exclusionary rule in State v. Sheridan, 96 N.W. 73) (1903) before the federal decision in Weeks v. United States, 232 U.S. 383 (1914) and appointed counsel in Carpenter v. Dane County, 9 Wisc. 274 (1859) prior to the federal determination in Gideon v. Wainright, 372 U.S. 335 (1963).

[10] "Project Report, Toward an Activist Role for State Bills of Rights," *Harvard Civil Rights-Civil Liberties Law Review* 8 (1973): 284.

[11] Ibid., p. 285.

[12] Ibid., p. 288.

[13] Ibid., p. 289.

[14] Ibid., p. 290.

[15] Ibid., p. 292.

[16] State v. Jewett, 146 Vt. 221, 500 A.2d 233 (Vt. 1985). Since 1970, 250 cases have held that state constitutions are broader than their federal constitutional counterparts.

[17] Ibid., p. 235.

[18] 463 U.S. 1032 (1983).

[19] 465 U.S. 324 (1984).

[20] 658 P.2d 879 (Colo. 1983).

[21] Roviaro v. United States, 353 U.S. 53 (1957).

[22] 465 U.S. 329.

[23] 733 P.2d 375 (Okla. 1987).

[24] Ibid., p. 381. See United State v. Janis, 428 U.S. 433 (1976).

[25] Ibid., p. 378. The exclusionary rule was incorporated in Hess v. State, 84 Okla. 73, 202 P. 310 (Okla. 1921).

[26] 367 U.S. 643 (1961).

[27] 733 P.2d 379.

[28] 127 N.H. 286, 499 A.2d 977 (N.H. 1985).

[29] 499 A.2d 981.

[30] Delaware v. Prouse, 440 U.S. 648 (1979). The Supreme Court has yet to grant a writ on this question presented.

[31] 706 P.2d 317 (Alas. 1985).

[32] 462 U.S. 213 (1983).

[33] Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969). The two-prong test consists of veracity or reliability and basis of knowledge.

[34] 462 U.S. 213.

[35] 105 N.J. 95, 519 A.2d 820 (N.J. 1987).

[36] 468 U.S. 897 (1984).

[37] 519 A.2d 857.

[38] Ibid., 849.

[39] Ibid., 856.

[40] Ibid., 854.

[41] Ibid., 856.

[42] 468 U.S. 928.

[43] 519 A.2d 857.

[44] 463 U.S. 1032.

[45] Greenhalgh, p. 21. Under this new rule, the Supreme Court will hear the state case if it was based on both state and federal grounds, but the state court increased the protection of the federal right. There is no reason why the Supreme Court needs to hear a case if the federal right has been protected because there is no danger that the federal interest will be lost.

[46] 463 U.S. 1042.

[47] Ibid., 1038, n.4.

[48] Ibid., 1041.

[49] 500 A.2d 233.

[50] Ibid., p. 238.

[51] 466 U.S. 380 (1984).

[52] 432 So.2d 97 (Fla. 1983).

[53] 466 U.S. 381.

[54] Ibid., 381-82.

[55] Ibid., 382. Although Stevens' opinion is a dissent, it did have an effect; per curiam reversals occurred less frequently since he pointed out the Court's action.

[56] Ibid., 387. Between the 1981 and the 1983 term, the Court decided 19 cases in summary fashion in favor of the warden or marshall reversing a decision which upheld a constitutional right (p. 386).

[57] 466 U.S. 727 (1984).

[58] 462 U.S. 213.

[59] See note 61.

[60] 466 U.S. 738.

[61] 394 Mass. 363, 476 N.E.2d 548 (Mass. 1985).

[62] Ibid., 555.

[63] Ibid.

[64] Ibid.,556.

[65] 346 N.W.2d 425 (S.D. 1984).

[66] South Dakota v. Neville, 459 U.S. 553 (1983).

[67] 346 N.W.2d 328.

[68] Ibid., 429.

[69] Gates, 462 U.S. 213; Oregon v. Hass, 420 U.S. 714 (1975).

[70] 359 U.S. 121 (1959).

[71] 359 U.S. 187 (1959).

[72] Bartkus, 359 U.S. 122.

[73] 55 U.S. (14 How.) 13, 20 (1852).

[74] Ibid., 124. At the time the Fourteenth Amendment was not understood to incorporate the first eight amendments.

[75] Ibid., 1[illegible]2.

[76] 359 U.S. 187.

[77] Ibid., 189.

[78] 260 U.S. 377 (1922).

[79] Ibid., 195.

[80] 359 U.S. 138.

[81] 361 U.S. 529 (1960).

[82] Rinaldi v. United States 434 U.S. 22, n.5 (1977).

[83] 474 U.S. 82 (1985).

[84] 350 U.S. 214 (1955).

[85] Ibid., 217.

[86] Ibid., 218.

[87] Ibid., 219.

[88] United States Constitution, Article VI:

> This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.

[89] 365 U.S. 381 (1960).

[90] Ibid., 384 n.4.

[91] Ibid., 385.

[92] 401 U.S. 37 (1971).

[93] Ibid., 54.

[94] 461 U.S. 95, 113 (1983).

[95] 80 U.S. (13 Wall.) 397 (1872).

[96] 19 U.S. (6 Wheat.) 598 (1821).

[97] 364 U.S. 206 (1959).

[98] 209 U.S. 123 (1908). A state official who violates the Constitution loses all immunity.

[99] 465 U.S. 89 (1984).

[100] 844 F.2d 1368 (9th Cir, 1987).

[101] Ibid., 1374.

[102] Ibid.

[103] Ibid., 1378.

[104] 721 F.2d 1229 (9th Cir. 1983).

[105] 364 U.S. 206 (1959).

[106] Ibid., 221.

[107] In re Lance, 37 Cal.3d 873, 694 P.2d 744, 210 Cal. Rptr. 631 (Cal. 1985). See appendix.

[108] See appendix.

[109] See appendix.

Cases since *Michigan* v. *Long* in Which a State Court Has Granted the Defendant More Protections Than the Supreme Court Finds within the U.S. Constitution.

Alabama

Ex Parte Lynn, 477 So.2d 1385 (1985)
Sixth Amendment: cross-examination

Bradley v. *State*, 494 So.2d 772 (1986) Dissent
Due Process: pretrial discovery

Alaska

Reeves v. *State*, 599 P.2d 727 (1970)
Fourth Amendment: inventory search

Stephen v. *State*, 711 P.2d 1156 (1985)
Fifth Amendment: custodial interrogation

Best v. *Municipality of Anchorage*, 712 P.2d 892 (1985)
Fourth Amendment: standing for suppression of evidence

State v. *Jones*, 706 P.2d 317 (1985)
Fourth Amendment: probable cause standard

Arizona

State v. *Adult*, 724 P.2d 525 (1986)
Fourth Amendment: exigent circumstances, inevitable discovery

Kunzler v. *Pima County Superior Court*, 744 P.2d 669 (1987) Concur
Sixth Amendment: right to counsel

State v. *Powers*, 742 P.2d 792 (1987)
Right to trial by jury

California

People v. *Ramos*, 689 P.2d 430 (1984)
Due Process: jury instructions

In re Lance, 694 P.2d 744 (1985)
Fourth Amendment: no vicarious exclusionary rule

In re William Misener, 698 P.2d 637 (1985)
Fifth Amendment: self-incrimination

Williams v. *People*, 709 P.2d 1287 (1985)
Fourth Amendment: search and seizure

People v. *May*, 748 P.2d 307 (1988)
Fourth Amendment: follow *Lance* and Proposition 8

Colorado

State v. *Nunez*, 658 P.2d 879 (1983)
Due Process: disclosure of informants

State v. *Deitchman*, 695 P.2d 1146 (1985) Concur
Fourth Amendment: good faith exception exists

People v. *Drake*, 748 P.2d 1237 (1988) Concur and Dissent
Fourth Amendment: list examples

Connecticut

State v. *Cohane*, 479 A.2d 763 (1984)
Fifth Amendment: self-incrimination

State v. *Simms*, 518 A.2d 35 (1986)
Grand jury implied use of state law

State v. *Jarzbek*, 529 A.2d 1245 (1987)
Due Process: exclude from witness room

State v. *Hufford*, 533 A.2d 1199 (1987)
Sixth Amendment: confrontation

State v. *Stoddard*, 206 Conn. 157 (1988)
Sixth Amendment: right to counsel

Georgia

State v. *Luck*, 312 S.E.2d 791 (1984)
Fourth Amendment: warrant requirement

Williams v. *Newsome*, 334 S.E.2d 171 (1985) Dissent
Indigent right to psychiatrist

Hawaii

State v. *Kalanu*, 520 P.2d 51 (1974)
Fourth Amendment: search and seizure

Idaho

Bates v. *State*, 679 P.2d 672 (1984)
State v. *Ankney*, 704 P.2d 333 (1985) Dissent
Due Process: seizure of driver's license

Illinois

People v. *Singleton*, 1988 Lexis 27
Fourteenth Amendment: Due Process

Indiana

Miller v. *State*, 517 N.E.2d 64 (1987)
Sixth Amendment: Confrontation Clause

Maryland

Hillard v. *State*, 406 A.2d 415 (1979)
Fifth Amendment: voluntariness; follow Maryland nonconstitutional law

Massachusetts

Commonwealth v. *Ford*, 476 N.E.2d 560 (1985)
Fourth Amendment: inventory search

Commonwealth v. *Upton*, 476 N.E.2d 548 (1985)
Fourth Amendment: search and seizure

Michigan

State v. *Chapman*, 387 N.W.2d 835 (1986)
Fourth Amendment: curtilage

Paramount Corporation v. *Miskins*, 344 N.W.2d 788 (1986)
Fifth Amendment: self-incrimination

Minnesota

State v. *Fuller*, 374 N.W.2d 722 (1985) Dissent
Sixth Amendment: double jeopardy

Missouri

State v. *Brown*, 708 S.W.2d 140 (1984) Concur and Dissent
Fourth Amendment: exclusionary rule

Montana

State v. *Solis*, 693 P.2d 518 (1984)
Fourth Amendment: search and seizure

State v. *Johnson*, 719 P.2d 1248 (1986)
Sixth Amendment: right to counsel

Nebraska

State v. *Havlat*, 385 N.W.2d 436 (1986) Dissent
Fourth Amendment: open fields

State v. *Hinton*, 415 N.W.2d 138 (1987)
Fourth Amendment: exclusionary rule

New Hampshire

State v. *Koppel*, 499 A.2d 977 (1985)
Fourth Amendment: search and seizure

State v. *Mercier*, 509 A.2d 1246 (1986)
Fifth Amendment: self-incrimination

New Jersey

Grand Jury Proceedings of Joseph Guarino, 516 A.2d 1063 (1986)
Fifth Amendment: self-incrimination

State v. *Gilmore*, 511 A.2d 1150 (1986)
Jury selection

State v. *Ramseur*, 524 A.2d 188 (1987) Dissent
Eighth Amendment: death penalty

State v. *Fritz*, 519 A.2d 336 (1987)
Sixth Amendment: right to counsel

State v. *Novembrino*, 519 A.2d 820 (1987)
Fourth Amendment: exclusionary rule

New York

People v. *P.J. Video*, 501 N.E.2d 556 (1986)
Fourth Amendment: search and seizure

People v. *Class*, 494 N.E.2d 444 (1986)
Fourth Amendment: search and seizure

People v. *Bigelow*, 488 N.E.2d 451 (1985)
Fourth Amendment: exclusionary rule

People v. *Alvarez*, 515 N.E.2d 898 (1987)
Fourteenth Amendment: due process

North Carolina

State v. *Lachat*, 343 S.E.2d 872 (1986)
Fifth Amendment: double jeopardy

Jackson v. *Housing Authority of the City of High Point*, 364 S.E.2d 416 (1988)
Jury selection

Oklahoma

Turner v. *City of Lawton*, 733 P.2d 375 (1987)
Fourth Amendment: exclusionary rule

Oregon

State v. *Magee*, 744.2d 250 (1987)
Fifth Amendment: *Miranda*

Rhode Island

State v. *VonBulow*, 475 A.2d 205 (1984)
Fourth Amendment: search and seizure

South Dakota

State v. *Neville*, 346 N.W.2d 425 (1984)
Fifth Amendment: self-incrimination

State v. *Auen*, 342 N.W.2d 236 (1984) Dissent
Jury trial

Texas

Sanchez v. *State*, 707 S.W.2d 575 (1986)
Fifth Amendment: Miranda

Wilkerson v. *State*, 726 S.W.2d 542 (1986) Dissent
Sixth Amendment: assistance of counsel

Utah

State v. *Ashe*, 745 P.2d 1255 (1987) Dissent
Fourth Amendment: search and seizure

Vermont

State v. *Jewett*, 500 A.2d 233 (1985)
Fourth Amendment: search and seizure

State v. *Ballou*, 535 A.2d 1280 (1987)
Fourth Amendment: probable cause

State v. *Wood*, 536 A.2d 902 (1987)
Fourth Amendment: search and seizure

Washington

State v. *Jackson*, 688 P.2d 136 (1984)
Fourth Amendment: probable cause

State v. *Chrisman*, 676 P.2d 419 (1984)
Fourth Amendment: search and seizure

State v. *Stroud*, 720 P.2d 436 (1986)
Fourth Amendment: search and seizure

State v. *Gunwall*, 720 P.2d 808 (1986)
Fourth Amendment: search and seizure

State v. *Box*, 745 P.2d 23 (1987) Dissent
Fourteenth Amendment: due process

West Virginia

State v. *Wyer*, 320 S.E.2d 92 (1984) Dissent
Sixth Amendment: right to counsel

Wisconsin

State v. *Rodgers*, 349 N.W.2d 453 (1984) Dissent
Fourth Amendment: search and seizure

Wyoming

Long v. *State*, 745 P.2d 547 (1987)
Sixth Amendment: right to counsel

Chapter 7

State Courts and Economic Rights

This chapter examines the role of state courts in protecting economic rights. Since the U.S. Supreme Court has decided to expend its constitutional energy on other issues, the protection of property rights from unwarranted state regulation rests essentially with state supreme courts. The correctness and effectiveness of this state court activism are legitimate and important concerns for all those interested in promoting an effective and balanced role for the state judiciaries in our constitutional system. The chapter will examine the arguments for and against state judicial activism in protecting economic rights, and the standards by which such activism can be judged. It will be argued that critics of this area of judicial activism assume too frequently the relevance of the federal experience and generalize their conclusions to the states without fully appreciating the significant difference found in the state constitutional traditions. We conclude by suggesting that it is necessary not only for judges but also for legislators and citizens to work together to strike a proper balance between a judiciary that does too much and one that does too little.

State constitutions are a mine of numerous, unique, and detailed provisions concerned with the protection of property rights. At least 34 state constitutions contain open court or right to access provisions for which there is no national equivalent.[1] These open court provisions can be found in the earliest constitutions as well as in ones adopted in the 20th century.[2] These provisions were included in constitutions to ensure that state legislatures would not tamper with common law remedies available to citizens and that states would not impose unreasonable financial conditions for access to the courts.[3]

A number of state constitutions also contain antimonopoly and antiperpetuities clauses for which one finds no national equivalents. These provisions also appeared in the earliest state constitutions and were adopted by other states in the 19th and 20th centuries.[4] The earlier antimonopoly provisions were aimed exclusively at public monopolies. These originated in the common law rule against perpetuities and the granting of exclusive franchises or licenses by the state, but they were also aimed at prohibiting excessive regulations on business.[5] Provisions adopted after the Civil War were written in such a way as to make them applicable to privately created monopolies as well.[6]

Finally, the constitutions of half the states contain taking clauses, which unlike the federal taking clause contain the phrase property shall not be taken "*or damaged*" for public use without just compensation.[7] The addition of the "or damaged" phrase was aimed at providing more protection than the federal equivalent, especially against legalized nuisances, which, generally, have not been interpreted as a "taking" by federal courts.[8] These exemplify but do not exhaust the variety of property provisions found in state constitutions.

One of the most controversial areas of state court activism in this era of the new judicial federalism is in the use of state due process, equal protection, and right-to-remedy clauses to strike down state and local economic regulations interfering with property interests. The movement to grant greater protection to individual rights on state constitutional grounds than the U.S. Supreme Court has granted under the federal Constitution has met generally with favorable responses.[9] However, when it comes to economic rights, the reaction has been less than enthusiastic.[10] This tepid response is understandable given the association of protecting economic rights with a period of the U.S. Supreme Court's history known as the *Lochner* era, in which, it is claimed, the Court adopted a laissez faire economic philosophy, striking down economic regulation in the name of free enterprise and property rights.[11]

This is not, however, without its ironies. The "new" judicial federalism is not "new" in the area of economic rights. State supreme courts relied on various provisions of their respective constitutions to protect such rights well before the Supreme Court discovered substantive due process, and they have continued to do so. These courts are major determinants of the extent to which property rights are given protection in the United States, and with regard to many areas of economic concern, state courts are the only judicial forums in which these issues are given a serious hearing. In part this is the result of the Supreme Court's decision to play little or no role in policing economic regulations, at least insofar as due process and equal protection challenges are concerned. As Lawrence Sager puts it:

> With extraordinary generality and finality federal courts have ceased to find in the Constitution any basis for intervening in the decisions of governmental entities to tax or regulate economic affairs.[12]

Justice William Brennan spoke for the Court of the last half century when he noted the wide latitude granted by the Court "to a valid exercise of the state's police power even if it results in *severe violations of property rights*."[13]

As pointed out in chapter 1, three clauses of the U.S. Constitution have been used by the federal courts to protect property rights: (1) the taking clause of the Fifth Amendment, (2) the contract clause, and (3) the due process clauses of the Fifth and Fourteenth Amendments. Nearly all state constitutions contain similar provisions.[14] This chapter concentrates primarily on the use of due process, equal protection, and right-to-remedy clauses by state high courts to review regulations that raise questions of property rights. This focus has four rationales: (1) the bulk of state court activity has been and continues to be focused on due process and equal protection as grounds for protecting property rights; (2) most states have incorporated the taking limitation into their due process clauses, thus making it difficult to distinguish the two limitations;[15] (3) when applying the taking or contract clauses, state courts generally have followed the federal precedents, which involve a balancing of private loss against public gain;[16] (4) the U.S. Supreme Court has remained active in applying the taking and contract clauses, deciding at least 18 major cases in the last ten years.[17]

State Courts and Economic Rights in the 19th Century

Substantive due process, the idea that legislation must not be arbitrary (i.e., it must have a real and substantial relationship to a legitimate state interest), arose first among state courts—a fact that was influential in its adoption by the U.S. Supreme Court.[18] Edward S. Corwin, after analyzing state and federal cases prior to the Civil War, credits *Wynehamer* v. *State of New York*[19] as the beacon case whose doctrine "less than 20 years from the time of its rendition . . . was far on the way to being assimilated into the accepted constitutional law of the country."[20] There were numerous other cases, enough to allow the conclusion that the development of substantive due process was as much a function of state judges interpreting state constitutions as it was the creation of federal judges.[21]

The adoption of the Fourteenth Amendment (1868) did not give immediate impetus to the development of economic due process as far as the Supreme Court was concerned, but state courts were quick to add it to their constitutional arsenals. Exemplary in this respect is the case of *In Re Jacobs* (1885).[22] The New York legislature had prohibited the manufacturing or preparation of tobacco in tenements in cities of 500,000 or more in population. The New York Court of Appeals voided the law as a deprivation of liberty without due process of law. In doing so, the court wrote:

> Liberty, in its broad sense as understood in this country, means the right, not only of freedom from actual servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful callings, and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements (except as such laws may be passed in the exercise by the legislature of the police power . . .) are infringements on his fundamental rights of liberty, which are under constitutional protection.[23]

This view is one that survived the 19th century among many state courts and remains an important principle guiding their decisions in this area. New York was not alone. Between 1885 and 1894, ten states adopted the same general approach. Bernard Siegan has suggested that the U.S. Supreme Court decision in *Allegeyer* v. *Louisiana*, in which the liberty of contract was constitutionalized, thus beginning the era of substantive due process, was not unexpected "because the federal judiciary was in fact following trends established in many states."[24] Protection of property and economic rights was not foisted on the country by the judiciary: doctrines of vested rights and economic due process were developed out of a commitment to protecting property and economic liberties that are part of the constitutional and political tradition of the United States.[25]

State Court Activity and Economic Rights, 1897-1987

The heyday of federal substantive due process, roughly 1897 to 1937, has been well studied.[26] The reaction to substantive due process as it was interpreted in *Lochner* and its progeny was so intense that the U.S. Supreme Court has, for all intents and purposes, abandoned any serious review of the kind of economic regulation that had been the prime target of the doctrine. Oliver Wendell Holmes' stinging dissent to *Lochner* became the definitive understanding of *Lochner*. Holmes' view, that *Lochner* was no more than an attempt to read into the Constitution a particular economic philosophy derived from Adam Smith and, more immediately, Herbert Spencer, became the dominant view among academic commentators as well as judges. In its place emerged a view that the due process clause, as far as economic regulation is concerned, means what its words suggest, namely, procedural but not substantive protection against government action.[27] While the U.S. Supreme Court has revived the general notion of substantive due process, and has recently indicated that it may become more solicitous of property rights, there has been no attempt to revive substantive due process as a basis for stricter review of economic and social regulation.[28]

What follows is a look at the extent to which state courts adopted a similar doctrine, how rigorously they applied it and in what areas, and the extent to which the state courts followed the U.S. Supreme Court in rejecting substantive due process. To get some idea of state court involvement in protecting economic rights, an examination was made of eight studies that collected cases in this area.[29] Added to the cases noted therein were decisions collected from lists provided by state courts themselves. Finally, to the above were added cases collected since 1980 from the regional reporters. A total of 391 cases were discovered using this method. Although this figure by no means represents all the cases decided by state high courts in this area, it is believed that it is representative of the activity of state courts in the period from 1897 to 1987.[30]

During the period of 1897-1937, state courts definitely emphasized substantive due process, with 70 percent of the cases being decided on this basis (see Table 1). This figure increased to 81 percent during the next period, 1938-1968, but dropped significantly to 18 percent during 1969-1987. The emphasis on equal protection decreased slightly

Table 1

State Supreme Court Activity and Economic Rights, 1897-1987

	Local Regulations/ Miscellaneous		Judicial Remedy		Anti-Competitive		Totals	
	(%)	(No.)	(%)	(No.)	(%)	(No.)	(%)	(No.)
1897-1937								
Substantive Due Process	75.0	15	50.0	1	66.7	10	70.3	26
Equal Protection	15.0	3	50.0	1	13.3	2	16.2	6
Substantive Due Process/ Equal Protection Combined	10.0	2	0.0	0	20.0	3	13.5	5
Total	100.0	20	100.0	2	100.0	15	100.0	37
1938-1968								
Substantive Due Process	71.1	27	0.0	0	85.6	143	81.0	170
Equal Protection	18.4	7	60.0	3	7.8	13	11.0	23
Substantive Due Process/ Equal Protection Combined	7.9	3	20.0	1	4.2	7	5.2	11
Miscellaneous	2.6	1	20.0	1	2.4	4	2.9	6
Total	100.0	38	100.0	5	100.0	167	100.0	210
1969-1987								
Substantive Due Process	25.8	8	5.1	4	48.0	12	17.9	24
Equal Protection	48.4	15	55.1	43	24.0	6	47.8	64
Substantive Due Proess/ Equal Protection Combined	9.7	3	5.1	4	24.0	6	9.7	13
Miscellaneous*	16.1	5	34.6	27	4.0	1	24.6	33
Total	100.0	31	100.0	78	100.0	25	100.0	134
Total Number of Cases	23.4	89	22.3	85	54.3	207	100.0	381

*Most of the cases in this category are open court or right-to-remedy provisions of state constitutions.

from 16 percent during 1897-1937 to 11 percent during 1938-1968, but then increased dramatically to 48 percent during 1969-1987. An increase in state legislative activity involving social and economic regulation may account for part of the shift, but does not seem to be the primary factor. Decisions as far back as the end of the 19th century decided on due process grounds would today almost certainly be decided on equal protection grounds.[31] The discrediting of due process as a basis for examining social and economic regulation, as well as the rise of equality as a constitutional value, have combined to make judges and scholars feel more comfortable with equal protection analysis, even though the outcomes are the same.[32]

A second significant aspect of the data is the existence of a consistent philosophy governing this judicial activism that persists throughout the periods in question. Fifty-three percent of all the cases examined fell into the anticompetitive category. State court judges struck down measures that either overtly or covertly tended to create monopoly and/or interfere with the operation of the marketplace. In decision after decision, judges concluded that the real as opposed to the ostensible purpose of the legislation in question was anticompetitive. In doing so, the judges were being true to what one scholar has demonstrated was one of the historically valid purposes of the due process clause, namely, protection against monopoly.[33]

The most recent period, 1969-1987, reveals a development of some promise in the use of open court or right-to-remedy clauses contained in most state constitutions. These clauses typically take the form of guaranteeing that all courts shall be open, and that all persons shall have a remedy for injuries suffered to their persons, property, or reputation. In conjunction with equal protection clauses, they have been used to strike down guest statutes (which preclude liability for nonpaying passengers in private vehicles), statutes of repose (which preclude liability), caps on malpractice awards, and similar measures. The U.S. Supreme Court has not addressed any of these issues directly. Assuming that at least some of these statutes are open to legitimate challenge, the only available forums for those challenges have been the state judiciaries. In fact, the single most striking development among state supreme courts in protecting economic rights since 1980 has been the increasing use of these right-to-remedy clauses, frequently in conjunction with equal protection clauses, to strike down a variety of legislative schemes.[34]

The protection of economic rights extends beyond the confines of the business world and involves a variety of groups and interests. These range from widows of workmen denied access to courts for claims to compensation[35] to suppliers of materials denied a special exemption from liability granted to architects.[36] These decisions have protected minors from statutes of limitation which would make suit impossible when those minors reached legal age[37] and consumers from attempts by legislatures to arbitrarily limit entry into professions, fix prices, or otherwise lessen competition.[38]

Standards of Review, 1970-1988

The most recent period of state court activity reveals important shifts in the ground for as well as the standards of review. The 144 cases examined during this period came from 44 states, with the largest numbers concentrated in Ohio (12), Alabama (12), Georgia (8), California (8), New Hampshire (5), and Texas (5). Fifty-six percent of these cases involved some kind of limitation on liability, whether product liability, guest statutes, or limitations on plaintiffs in suits involving the medical profession. In the majority of these cases, the enactments were struck down on right-to-remedy and/or equal protection grounds, suggesting that state court activism is most likely to be triggered when legislatures tamper with traditional common law remedies for injuries without providing alternative relief.

The movement toward stricter liability in torts and the rise of product liability claims coupled with a perceived medical malpractice crisis, galvanized a variety of groups to seek relief before state legislatures. The result was legislation placing limitations on liability in a variety of areas, but especially in the health professions. State courts have not been unanimous in their responses to this legislation. With the exception of the guest statutes where state courts have struck down almost all of those remaining on the books, state courts have sustained a variety of limitations on liability.[39] The statutes upheld, in most cases, have been less drastic with respect to remedies left for plaintiffs.[40] Prominent examples of state courts that have upheld such legislation are California and Indiana. The California Medical Injury Compensation Act of 1975 was challenged in four different suits, all of which the California Supreme Court sustained by using a rational basis test.[41] A similar act adopted in Indiana was also upheld.[42]

Equal Protection. In applying equal protection clauses, state courts have resorted to a variety of approaches, running from rational relationship to strict scrutiny, and in at least two cases, a standard altogether different from the three-tiered federal analysis.[43]

Some of the state courts that claim to be applying the rational relationship test are actually requiring a more demanding standard of review. In *Whitworth* v. *Bynum*,[44] the Texas high court declared that the state's guest statute had no rational relationship to any legitimate state interest. Applying the same test, the U.S. Supreme Court upheld similar legislation.[45] In *Ketcham* v. *Kings County Medical Service*,[46] the

Washington court held an optometrist reimbursement scheme to be void on a rational relationship standard, while the dissenters had no problem coming up with facts to sustain the classification.

Other courts have applied a means-scrutiny or middle-tier standard.[47] The significance of this standard can be seen in the case of *Tabler* v. *Wallace*. In the face of some imaginative "reasonable bases" provided by the attorneys for the state, the Kentucky court responded by arguing that the state equal protection clause requires there to be a "substantial and justifiable reason apparent from the legislative history, statute or some other authoritative source," and that "reasons that could exist without anything of a positive nature to suggest that they did exist do not suffice."[48]

Another approach used by state judiciaries is to combine equal protection analysis with some other provision of their constitution. The most common combination is with due process and/or right-to-remedy clauses. In the cases combining equal protection and due process, the result looks very much like a substantive due process test.[49] In *Benson* v. *North Dakota Workmen's Compensation Bureau*,[50] the North Dakota high court demanded a close correspondence between statutory classification and legislative goals. In *Henderson Clay Products, Inc.* v. *Edgar Woods and Associates, Inc.*, the fusion of equal protection and due process is equally clear. The Court held that the statute was an "unreasonable and arbitrary legislative classification. . . ."[51] This fusion of equal protection and due process results in an intermediate level of review under the mantle of the more "respectable" equal protection clause.[52]

Equal protection was combined most frequently with the right-to-remedy clauses of state constitutions. This combination almost always resulted in having the remedy clauses being declared fundamental rights, thus triggering strict scrutiny.[53] Other combinations were also found. In *Maryland State Board of Barber Examiners* v. *Kuhn*,[54] equal protection was combined with the right to pursue a lawful occupation as guaranteed by Article 23 of the state's Declaration of Rights.

Due Process. Under the due process clauses, similar patterns emerged, though with vaguer standards. Although some decisions rested on a rational relationship test, most appear to have involved closer scrutiny than would be undertaken by federal courts.[55] A few clung to an approach that goes back to the 19th century. Georgia continues to rely on substantive due process of the *Lochner* variety. "The right to contract . . . and agree on price is a property right protected by the due process clause of our Constitution, and unless it is a business affected with the public interest, the General Assembly is without any authority to abridge that right."[56] Aware of its relative isolation, the Georgia court noted that this was its position "no matter what other states or the Supreme Court of the United States may or may not have decided."[57]

More typical is *Louis Finocchiaro Inc.* v. *Nebraska Liquor Control*. Here the court required a "clear, real and substantial connection between the assumed purpose of the enactment and the actual provisions thereof."[58] Unlike the federal rational relationship test, these states have required that the rationale be spelled out explicitly; any conceivable rationale that might be adduced will not suffice. These "pure" substantive due process cases are relatively rare in contemporary state constitutional law. Aside from a few scattered cases elsewhere, they are concentrated in the South.

As with the equal protection cases, due process is occasionally linked with other provisions of state constitutions. *In In re Certificate of Need for Aston Park, Inc.*,[59] the North Carolina court linked due process analysis with the constitutional prohibitions against monopolies and perpetuities; in *Nelson* v. *Krusen*,[60] due process was coupled with the open court provision of the Texas Constitution; and in *Magna, Inc.* v. *Catrania*,[61] due process was connected with the explicit provisions regarding property rights found in the Alabama Constitution. Such uses of state due process clauses to protect property rights find support in the numerous and explicit references to property found in most state constitutions.

There are some cases that do not rely on equal protection or due process in any way. Most of these cases are based on right-to-remedy or open court provisions,[62] while still others resort to contract clauses[63] or guarantees for workers' compensation for injury or death.[64] Finally, at least two states, Louisiana and New Jersey, have rejected not only the results of various U.S. Supreme Court decisions based on equal protection but also the federal multiple-tier analysis itself. Both states have adopted what appear to them to be more fluid and protective approaches.[65]

State courts have resorted to a variety of combinations of state constitutional provisions and a variety of tests in reviewing legislation.[66] This is not surprising. States and their judiciaries are by law and history independent and diverse entities. Moreover, given the generally discredited history of the protection of economic rights, especially through the use of substantive due process, it is understandable that state judges who believe that their constitution, and their position in the federal system, give them a role to play in protecting economic rights, are groping for a sound basis for this role. The search has involved plotting a